SECTION-BY-SECTION ANALYSIS

To accompany a draft bill

"To modernize certain laws governing the civil service, and for other purposes."

SECTION 1. SHORT TITLE.

The first section of the bill titles the bill as the "Working for America Act of 2005" and provides a table of contents for the bill.

SECTION 2. PURPOSE.

Section 2 of the bill describes the purpose of the bill as ensuring that agencies are equipped to better manage, develop, and reward employees to better serve the American people. The draft bill would accomplish this objective by amending title 5, United States Code, to establish a Federal human resources management system that incorporates four fundamental principles:

(1) Employees should have clear goals for their performance, as well as opportunities for professional growth and managers who help them succeed. Pay increases for individual employees should be based on performance, not longevity.

(2) Any human resources management flexibilities available to Federal agencies must be exercised in accordance with the core values, principles, and protections of the American civil service, including (a) the merit system principles set forth in chapter 23 of title 5, U.S. Code; (b) laws and regulations barring discrimination and reprisal against whistleblowers, and shielding employees from political influence and personal favoritism; (c) the right of employees to due process in actions taken against them based on performance or conduct; (d) veterans' preference; and (e) the right of employees – subject to the provisions of this Act – to organize, bargain collectively, and otherwise participate (through labor organizations of their own choosing) in decisions affecting them.

(3) Employees at all levels must be accountable for their performance.

(4) Agencies must be accountable for meeting standards for effective human capital management in carrying out their missions.

Finally, section 2 of the draft bill would require the Director of the Office of Personnel Management (hereafter referred to as "the Office") to perform a Governmentwide coordination and oversight role in order to ensure that human resources management flexibilities provided by the draft bill are implemented and carried out in a manner consistent with the four principles set forth in the section.

The terms "human resources" and "human capital" appear in different places in the draft bill and are not interchangeable. The term "human resources management" is used in regard to the Federal employee workforce, while "human capital management" connotes,

more broadly, the strategic management of all individuals the Federal Government can deploy to accomplish its missions. Many of the draft bill's provisions are designed in part to reflect the transformation of the Office of Personnel Management from a process-oriented regulator of agency personnel practices to the strategic manager of the Federal Government's human capital.

Titles I through IV of the bill contain the various amendments to title 5, United States Code, designed to modernize the Federal civil service. Title V of the bill contains effective date and savings provisions.

TITLE I. AUTHORITIES OF THE OFFICE OF PERSONNEL MANAGEMENT; MISCELLANEOUS AUTHORITIES RELATING TO FEDERAL HUMAN CAPITAL MANAGEMENT

Title I of the bill includes amendments to update various provisions of chapters 11, 13, 14, 21, and 29 of title 5, United States Code, in part to reflect changes made by other provisions of the bill. Title I includes more contemporary provisions regarding the responsibilities of the Office of Personnel Management, as well as codification of the Chief Human Capital Officers Council and provisions relating to employee surveys; it also would repeal an antiquated requirement that the Civil Service Commission maintain minutes of its proceedings.

Section 101 of the bill would amend chapter 11 of title 5, U.S. Code, relating to the Office of Personnel Management.

Paragraph (1)(A) of section 101 would amend section 1103(a) of title 5 to adjust and clarify the basic authorities of the Director of the Office of Personnel Management.

Paragraphs (1)-(3) of 5 U.S.C. 1103(a) are essentially unchanged.

Paragraph (4) of amended section 1103(a) describes the function of directing both the preparation of requests for appropriations for the Office and the use and expenditure of funds by the Office, including incurring official reception and representation expenses of the Office, which may be subject to a limitation prescribed in law. This combines functions currently described separately in paragraphs (4) and (9).

Paragraph (5) updates the function currently described in paragraph (7). Not only does it include aiding the President in preparing such civil service rules as the President prescribes and otherwise advising the President on actions which may be taken relative to the civil service and a systematic application of the merit system principles (including recommending policies relating to the selection, training, promotion, transfer, performance, compensation, conditions of service, tenure, and separation of employees), but it also clarifies the scope of the function by reference to the strategic management of an efficient, effective, results-oriented civil service.

Paragraph (6) of the amended 5 U.S.C. 1103(a) largely restates the function currently described in paragraph (5). It speaks to executing, administering, and enforcing the civil service rules and regulations of the President and the Office and the laws governing the civil service, except with respect to the functions for which the Merit Systems Protection Board, the Office of the Special Counsel, the Office of Government Ethics, the Federal Labor Relations Authority, the Department of Labor, or the Equal Employment Opportunity Commission is primarily responsible. It omits the reference to retirement and classification activities, which are mentioned later in the subsection.

Paragraph (7) adds a new function of serving as a point of contact for Congress on issues concerning accountability for the strategic management of human resources within the Executive branch.

Paragraph (8) adds a new function of conducting broad systemic reviews of various aspects of Federal human capital management.

Amended paragraph (9) of amended section 1103(a) adds a new function of designing, developing, and delivering human resources management strategies, policies, and technical assistance that sustain agencies' capacity in six ways. Specifically, the policies and assistance are to help agencies identify their current and future workforce requirements; recruit a high quality and diverse workforce; train and develop employees; hold employees accountable for meeting high standards of performance and conduct; offer compensation that rewards high performance; and provide benefits to employees, annuitants, and their dependents.

Paragraph (10) addresses the duty to carry out the Office's responsibilities with respect to the civil service in two broad respects: first, by establishing and administering Governmentwide authorities, systems, and programs; and, second, by approving, certifying, and coordinating agency-specific authorities established under title 5.

Paragraph (11) adds a function relating to agency accountability. It includes assisting agencies in establishing their own accountability systems for evaluating the effectiveness of their human resources management programs and, when necessary, informing the President of serious violations of merit system principles and laws governing the civil service, and directing appropriate action.

New paragraph (12) adds a new function of leading the development and management of information technologies to improve Federal human resources management strategies, policies, processes, and practices.

New paragraph (13) adds the function of chairing the Chief Human Capital Officers Council that was established by the Chief Human Capital Officers Act of 2002 and which would be placed in a new section 1403 of title 5 by section 103 of the draft bill. This new function involves the coordination of interagency cooperation and action on common human resources management concerns.

Section 101(1)(B) of the bill would, in clause (i), amend subsection (c)(1) of section 1103 to conform the subsection to the title of the section ("Functions of the Director") by striking "Office of Personnel Management" and inserting "Director" and, in clause (ii), amend subsection (c)(2) by striking "of Personnel Management".

Section 101(2) of the bill would amend section 1104 of title 5, both in the catchline and in subsection (a)(1) to modernize the terminology used in the section by striking "personnel" and inserting "human resources."

Section 101(3) of the bill would amend the table of sections for chapter 11 of title 5 to reflect the revision of the title of section 1104.

Section 102 of the bill would amend chapter 13 of title 5, United States Code, by effectively repealing section 1307, which required the Civil Service Commission to keep minutes of its proceedings, and replacing it with new authority for the Director of the Office of Personnel Management. Paragraph (1) of that section of the bill would insert the new language authorizing the Director to interpret references to "General Schedule employees" or "employees under the General Schedule" or references of a similar nature to determine coverage under provisions of title 5 or related statutes. The new language also would allow the Director to interpret statutory references to General Schedule grades or other related terms in order to determine equivalencies under other classification or pay systems. Given the movement of hundreds of thousands of Federal employees into alternative pay systems, this new provision is designed to avoid the need to amend hundreds of provisions of law in which coverage under the General Schedule historically provided a convenient reference that could be used to confer or exclude or limit coverage under other provisions of law. Paragraph (2) of section 102 of the bill would revise the table of sections by amending the item relating to section 1307 to reflect the new title, "References to the General Schedule."

Section 103 of the bill would amend chapter 14 of title 5, United States Code, to codify in that title the provisions establishing a Chief Human Capital Officers Council as previously enacted in uncodified form as section 1303 of Public Law 107-296. Paragraph (1) of section 103 would incorporate the language of the existing section.

New section 1403, in subsection (a), establishes a Chief Human Capital Officers Council and describes its composition. Paragraph (1) of that subsection names the Director of the Office of Personnel Management to the Council and designates the Director as chairperson of the Council. Paragraph (2) names the Deputy Director for Management of the Office of Management and Budget to the Council and designates that Deputy Director as vice chairperson of the Council. Paragraph (3) names to the Council the Chief Human Capital Officers of Executive departments and any other members who are designated by the Director of the Office of Personnel Management.

Subsection (b) of the new section requires the Council to meet periodically to advise and coordinate the activities of the agencies of its members on such matters as modernization

of human resources systems, improved quality of human resources information, and legislation affecting human resources operations and organizations.

Subsection (c) of the new section requires the Council to ensure that representatives of Federal employee labor organizations are present at a minimum of one meeting of the Council each year. It also states that such representatives cannot be members of the Council.

Subsection (d) of new section 1403 requires the Council to submit a report on the activities of the Council to the Congress each year.

Paragraph (2) of section 103 of the draft bill would amend the table of sections for chapter 14 of title 5, United States Code, by adding an item relating to new section 1403 entitled "Chief Human Capital Officers Council."

Section 104 of the bill would amend chapter 21 of title 5, United States Code, to restructure and supplement the current provisions. Paragraph (1) would amend the chapter heading to reflect the addition of a new subchapter concerning the occupational structure of the civil service. Paragraph (2) would redesignate sections 2101 through 2109 as subchapter I and would insert, after the chapter heading, a new subchapter heading entitling the new subchapter as "Subchapter I—Definitions." Paragraph (3) would insert after the material redesignated as subchapter I two new sections, which define "coordination" and "implementing directives," respectively.

New section 2110 of title 5 defines "coordination" for the purposes of chapters 11, 21, 43, and 52 (except as otherwise provided) as the process by which an agency, after appropriate staff-level consultation, provides the Office of Personnel Management with notice of a proposed action and the intended effective date. If the Director of the Office concurs, or fails to respond to that notice within 30 days after receiving the notice, the agency may proceed with the proposed action. However, if the Director raises an objection based on a concern that some aspect of the proposed action has Governmentwide implications, the agency may not proceed with the part of the proposed action that is in dispute until that matter is resolved.

New section 2111 of title 5 provides a definition of "implementing directives" for use throughout the title. In particular, this term is used in new chapter 52 as added by Title II of the bill. The term refers to rules issued by an agency head (or his or her designee) to carry out any policy or procedure established in accordance with a provision of title 5, U.S. Code. The agency head (or designee) has sole and exclusive discretion to determine whether particular implementing directives will apply to the entire agency or to one or more parts of the agency.

Paragraph (4) of section 104 of the bill would insert in title 5, United States Code, after new section 2111, a new subchapter II entitled "Occupational Structure of the Civil Service."

Within that new subchapter, there are two new sections. New section 2121 describes the responsibilities of the Director of the Office of Personnel Management with regard to the occupational structure of the civil service. This new section reflects the distinction between defining the work an occupation covers and establishing job grading standards. This section does not affect the establishment of job grading standards, but rather sets forth explicitly, in the appropriate place in title 5, authority that the Director has long exercised and is essential to his or her responsibility to maintain basic information about the Government's occupational structure. Subsection (a) of that new section requires the Director, except as provided in regulations he or she prescribes – or pursuant to regulations prescribed jointly by the Director and the Secretary of Homeland Security under chapter 97 of title 5 or by the Director and the Secretary of Defense under chapter 99 of title 5 – to define occupational series in the civil service and to publish the definitions in whatever form the Director determines is appropriate. The reference to regulations in subsection (a) is intended to make clear that the Director's authority under new section 2121 in no way interferes with or changes the authority to establish occupational series as provided for in the joint regulations governing the human resources management system for the Department of Homeland Security and the National Security Personnel System. Nothing in this section is intended to disturb any independent authority a particular agency may have relating to its occupational structure. Subsection (b) of new section 2121 authorizes the Director to designate categories of occupational series for such purposes as he or she may determine. Subsection (c) authorizes the Director to prescribe regulations to carry out his or her responsibilities under the new section, including regulations to administer provisions of title 5 that affect only certain occupations.

New section 2122 of title 5 describes the responsibilities of agencies. Subsection (a) of that new section requires agencies, at the request of the Director of the Office, to furnish information for, and cooperate in, defining occupations and occupational categories. An agency whose classification authority is found in a statute other than chapter 51 or 52 of title 5 would nevertheless be required to provide the Director with whatever information the Director needs in order to determine how many employees and positions in the agency are within a particular occupational series established under section 2121. Subsection (b) defines "agency" to include, with limited exceptions, any Federal agency with civilian employees who are covered by any provision of title 5, United States Code, including the Smithsonian Institution. Those excluded are the United States Postal Service, the Postal Rate Commission, the Central Intelligence Agency, and any other elements of the intelligence community (as defined in section 3(4) of the National Security Act of 1947, as amended) that the Director of National Intelligence designates.

Paragraph (5) of section 104 of the bill would amend the table of sections to reflect the redesignation of existing chapter 21 as subchapter I of that chapter, the addition of a new section to that subchapter, as so redesignated, and the addition of a new subchapter II containing new sections 2121 and 2122.

Section 105 of the bill, in paragraph (1), would amend section 2951 of title 5, United States Code, relating to reports to the Office of Personnel Management. The amended section requires each agency to report to the Office, at regular intervals, information relating to

positions and employees in the agency. It also requires the Director of the Office to prescribe the form and frequency of those reports. Agencies covered by this section are those with employees who are covered by any provision of title 5, U.S. Code, including the Smithsonian Institution. Section 2951, as amended, also authorizes the President or the Office to exempt an agency or group of employees from this reporting requirement when the President or Office determines that the exemption is in the public interest. This determination would have to be published in the *Federal Register*. The bill provides directly for an exemption for elements of the intelligence community (as defined in section 3(4) of the National Security Act of 1947, as amended) that are designated by the Director of National Intelligence.

Paragraph (2) of section 105 of the bill would amend the heading for subchapter II of chapter 29 to reflect the addition, in paragraph (3), of a new section on employee surveys.

Paragraph (3) of section 105 of the bill would add at the end of subchapter II of chapter 29 a new section 2955 on employee surveys, essentially to codify the language currently contained in section 1128 of Public Law 108-136. That section requires each agency (defined in the new section as an Executive agency) to conduct an annual survey of its employees (including survey questions unique to the agency and questions required to be prescribed by the Director of the Office of Personnel Management that are common to all agencies) to assess appropriate metrics referred to in section 1103(c) of title 5 (for which Congress has already required the Office to set standards); the leadership and management practices that contribute to agency performance; as well as employee satisfaction with leadership policies and practices, the work environment, rewards and recognition for professional accomplishment and personal contributions to the achievement of the mission of the organization, opportunities for professional development and growth, and opportunities to contribute to the achievement of the mission of the organization. With the exception of subsections (d) and (e), the newly codified version is nearly identical to the existing section. Subsection (b) of the newly codified section requires the Director of the Office to prescribe, in whatever form he or she determines necessary, survey questions that should appear on all agency surveys in order to allow a comparison across agencies. In prescribing the questions, the Director is required to consult with the Chief Human Capital Officers Council and to secure the concurrence of the Director of the Office of Management and Budget. Subsection (c) of both versions requires the results of agency surveys to be made available to the public and posted on the website of the agency involved, unless the head of the agency determines that doing so would jeopardize or negatively impact national security. Subsection (d) of new section 2955, unlike the uncodified version, authorizes the Director to waive the requirement for a survey when he or she determines that such a requirement would create a substantial hardship or is not in the best interests of the Federal Government. Finally, subsection (e) exempts from the survey requirements the Central Intelligence Agency and elements of the intelligence community designated by the Director of Central Intelligence.

Paragraph (4) of section 105 of the bill would amend the table of sections to reflect the renaming of subchapter II and the addition of new section 2955 of title 5.

TITLE II. RESULTS-DRIVEN, MARKET-BASED COMPENSATION

Title II of the bill consists of sections 201 through 203.

Amendments to chapter 43 of title 5 — Performance Appraisal

Section 201 of the bill would amend chapter 43 of title 5, U.S. Code, by replacing subchapter I, creating a new subchapter II, and redesignating the current subchapter II as subchapter III.

Paragraph (1) of section 201 of the bill would amend subchapter I of chapter 43 in its entirety to set forth the general provisions (sections 4301 through 4305) that apply to the entire chapter, such as authority, coverage, definitions, and responsibilities of the Office of Personnel Management.

Subchapter I of chapter 43 — General Provisions

The new section 4301 of title 5, U.S. Code, requires agencies, in coordination with the Director of the Office, to establish performance appraisal systems to promote high performance and permits agencies to administer and maintain those systems electronically.

The new section 4302(a) of title 5 states that, except as otherwise provided in subsection (b), chapter 43 applies to all positions and employees of an Executive agency and the Government Printing Office.

Subsection (b) of new section 4302 lists categories of excluded employees. These exclusions generally correspond to the exclusions currently found in section 4301; however, employees of the Departments of Homeland Security and Defense who are covered by the new human resources management systems established for those agencies under chapters 97 and 99, respectively, of title 5, employees of the elements of the intelligence community designated by the Director of National Intelligence, and employees specifically excluded from chapter 43 by law have been added to the exclusions. New section 4302 also excludes employees of Government-controlled corporations. This is different from the current chapter 43, which excludes employees of all Government corporations, regardless of whether the corporation in question is Government-owned or Government-controlled. Under the new section 4302, employees of Government-owned corporations will be covered. This change is intended to make the coverage provisions of chapter 43 consistent with the coverage provisions of the new chapter 52 of title 5 (as added by section 202 of the draft bill), insofar as employees of Government corporations are concerned. Also, chapter 43 currently permits the Office, by regulation, to exclude employees not in competitive service positions from coverage; section 4302(b), as amended, would no longer limit this authority to excepted service positions. In addition, the authority to exclude temporary employees under certain conditions has been removed.

Subsection (c) of new section 4302 states that, notwithstanding any other provision of law, an otherwise excluded category of employees may be covered by amended chapter 43 with

the joint approval of the Director of the Office and the agency responsible for the performance management system.

New section 4303 of title 5, U.S. Code, consists of four simple definitions of terms used in the chapter: "coordination," which is defined by reference to new section 2110 of title 5 (as added by section 104(3) of the draft bill); "Director," which is defined as the Director of the Office of Personnel Management; "employee," which is defined by reference to 5 U.S.C. 2105; and "Office," which is defined as the Office of Personnel Management.

The new section 4304 of title 5 describes the Director's responsibilities in administering the chapter.

Subsection (a) of that new section permits the Director to review agency performance appraisal systems established under chapter 43 to determine whether those systems meet the requirements of the chapter.

Subsection (b) of new section 4304 requires that, when the Director determines that a performance appraisal system does not meet the requirements of amended chapter 43 or regulations prescribed under that chapter, the Director must direct the agency to (1) implement an appropriate system or (2) take other appropriate corrective action. Subsection (b) explicitly requires agencies to take any corrective action the Director prescribes.

New section 4305 of title 5, U.S. Code, requires the Director to prescribe regulations to carry out the amended chapter.

Paragraph (2) of section 201 of the bill would redesignate subchapter II of chapter 43 as subchapter III (and renumber its sections accordingly), without any additional changes. Subchapter III, as redesignated, applies only to members of the Senior Executive Service.

Paragraph (3) of section 201 of the draft bill would create a new subchapter II of chapter 43 of title 5 that establishes the requirements for the performance management of non-SES employees and positions covered by amended chapter 43.

Subchapter II of chapter 43 — Performance Appraisal for the General Workforce

The amended subchapter II of chapter 43 of title 5 would consist of sections 4311 through 4315.

New section 4311 of title 5, U.S. Code, in subsection (a), defines various terms used in the new subchapter II, in addition to the terms defined in amended section 4303. The new section includes definitions of "performance appraisal system," "performance expectations," "rating of record," and "unacceptable performance." The definition of "performance appraisal system" encompasses any policy or procedure of a covered agency, as well as any regulation of the Director of the Office, pertaining to setting and communicating expectations, monitoring and providing feedback on performance,

developing and rating performance, and addressing poor performance. "Performance expectations" is defined to include (1) the duties, responsibilities, and competencies required by an employee's position (or the objectives associated with the position) and (2) the contributions and competencies management expects the employee to demonstrate, as described in regulations prescribed by the Director. A rating of record must include a summary rating level as described in section 4315(a) and is prepared at the end of an employee's appraisal period or at any other time to support a determination regarding the employee's pay under new chapter 52 of title 5 or other applicable provisions. Finally, new section 4311 retains a modified version of the definition of "unacceptable performance" that is in current law. The amended definition reflects the fact that written performance expectations may be amplified through unwritten work assignments or oral instructions, and that employees may be held accountable for expectations that are so amplified.

Subsection (b) of new section 4311 makes clear that subchapter II of chapter 43 does not apply to members of the Senior Executive Service, who are covered instead by subchapter III of chapter 43 as redesignated by section 201(2) of the draft bill.

New section 4312(a) of title 5 requires that, under regulations prescribed by the Director, each performance appraisal system must provide for setting and communicating performance expectations; monitoring performance and providing timely feedback; developing employee performance and addressing poor performance; rating (generally on an annual basis) employees' performance based on expectations (as defined in new section 4311); holding supervisors and managers accountable for the effective management of the performance of employees they supervise; and involving employees in the development and implementation of the performance appraisal system.

Subsection (b) of new section 4312 specifies that supervisors and managers are accountable for clearly communicating performance expectations and holding employees accountable for accomplishing them; making meaningful distinctions among employees based on performance; fostering and rewarding excellent performance; addressing poor performance; and making sure that employees are assigned a rating of record (in accordance with regulations prescribed by the Director of the Office and any agency implementing directives).

New section 4313(a) of title 5, U.S. Code, stipulates that performance expectations must support and align with agency mission and strategic goals, organizational program and policy objectives, annual performance plans, results, and other measures of performance. Expectations must be communicated to employees in writing before the appraisal period begins, but may, as provided in subsection (c), subsequently be amplified through specific assignments and oral instructions relating to those assignments.

Subsection (b) of new section 4313 provides that the performance expectations for supervisors and managers must include the degree to which supervisors and managers plan, assess, monitor, develop, correct, rate, and reward subordinate employees' performance.

Subsection (c) of new section 4313 permits performance expectations to be amplified through specific work assignments or other instructions, which need not be in writing. These assignments and instructions may provide more specific information about the quality, quantity, accuracy, timeliness, or other expectations the supervisor has regarding the assignment.

Subsection (d) of new section 4313 requires supervisors to involve employees (to the extent practicable) in the development of their performance expectations, but reserves final decisions regarding performance expectations to the sole and exclusive discretion of management.

New section 4314(a) of title 5 prescribes what a supervisor must do when he or she determines that an employee's performance is unacceptable. The supervisor is required to consider the range of options available to address the performance deficiency. These options include but are not limited to remedial training, a period during which the employee would be given an opportunity to improve, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action defined in amended chapter 75 of title 5. The supervisor also is required to take appropriate action to address the deficiency. In assessing the appropriateness of particular remedies, the supervisor normally would take into account relevant circumstances, including the nature and gravity of the unacceptable performance and its consequences.

Subsection (b) of that new section permits employees to appeal adverse actions based on unacceptable performance in accordance with the provisions in chapter 77, as amended by section 403 of the bill.

New section 4315(a) of title 5, U.S. Code, requires agency performance appraisal systems to establish a summary rating level of unacceptable performance, a summary rating level of fully successful performance (or equivalent), and at least one summary rating level above fully successful performance for employees who are not in an Entry/Developmental band. It also permits an agency to establish a two-level rating system (consisting of an unacceptable summary rating level and a summary rating level of fully successful or equivalent) for employees in an Entry/Developmental band.

Subsection (b) requires the use of a rating of record as a basis for a pay determination, awards under an agency awards program, eligibility for promotion, service credit for retention in a reduction in force, and other actions that the agency considers appropriate or the Director of the Office requires by regulation.

Subsection (c) of new section 4315 prohibits the imposition of a fixed numeric or percentage limit on the assignment of summary rating levels, otherwise known as a forced distribution.

Paragraph (4) of section 201 of the bill would provide an amended table of sections for chapter 43.

A new chapter 52 of title 5 – Strategic Compensation System

Section 202 of the draft bill would amend title 5, United States Code, by creating a new chapter 52 entitled "Strategic Compensation System" composed of eight subchapters. The strategic compensation system created by chapter 52 would replace, for covered employees, certain classification and pay systems established by chapters 51 and 53. The affected systems include the General Schedule, the Federal Wage System, and the system for senior-level and scientific and professional (SL/ST) employees established by section 5376.

Subchapter I of chapter 52 – General Provisions

Subchapter I of the new chapter 52 consists of sections 5201 through 5209. It contains general provisions relating to such matters as purpose, eligibility and coverage, the relationship of the chapter to other provisions of law, definitions, collaboration requirements, and responsibilities of the Office and agencies.

New section 5201(a) of title 5, U.S. Code, states the purpose of the chapter, i.e., to establish the new core strategic compensation system and to allow agencies to establish alternative strategic compensation systems in accordance with section 5209. The core system is designed to be flexible to allow for the strategic allocation of resources to meet mission needs, to be performance-focused, to generate trust and respect through employee involvement, and to be based on merit system principles. Subsections (b) and (c) state, respectively, that a position classification system established under this chapter replaces any classification system established under other authority, and any pay system established under subchapters III through VIII of this chapter or under new section 5209 replaces any pay system established under other authority. Subsection (d) requires the merit system principle of equal pay for work of equal value, and appropriate incentives and recognition for excellence in performance, to be exercised in a manner that takes into account various factors, including duties and responsibilities of the position, mission requirements, levels of employee performance, and labor market rates (for the type of work, location, and performance level). Subsection (e) requires that, to ensure the chapter's purposes are achieved, the chapter must be interpreted in a way that recognizes each agency's critical mission and that great deference must be accorded to the Director's interpretations and implementing regulations.

New section 5202 of title 5 addresses who will be eligible for coverage under either the new core strategic compensation system established under chapter 52 or an alternative strategic compensation system established under section 5209, and how that coverage will be extended.

Subsection (a) of section 5202 provides that, in general, chapter 52 applies to employees of Executive agencies and certain specified legislative branch agencies (i.e., the Library of Congress, the Botanic Garden, the Government Printing Office, and the Office of the Architect of the Capitol). These are the same agencies that are currently covered by the

General Schedule classification system established under chapter 51 of title 5. However, subsection (a), in paragraph (2)(B), provides a list of employees of those agencies who are excluded from coverage under the new chapter. These exclusions generally correspond to the General Schedule exclusions in section 5102, except that prevailing rate employees are not excluded. Members of the SES are expressly excluded from coverage; they will remain covered by subchapter VIII of chapter 53. Employees in certain senior-level and scientific and professional positions paid under 5 U.S.C. 5376 are also excluded from chapter 52. Exclusions have been added for employees of the intelligence community, as well as for employees of the Department of Homeland Security (DHS) and the Department of Defense (DoD). DHS and DoD employees who are currently covered by the General Schedule, the Federal Wage System, or the SL/ST system are eligible for coverage under special DHS or DoD compensation systems as provided in chapters 97 and 99 of title 5, United States Code. Also excluded are employees in a category expressly excluded from chapter 51 or 52 by statute or through the exercise of an express statutory authority (such as employees covered by a demonstration project under chapter 47 that uses a banded pay system in lieu of the General Schedule). Paragraph (2)(C) of subsection (a) retains a provision in current law to clarify that the only employees of the Office of the Architect of the Capitol who are excluded by paragraph (2)(B) are those whose pay is fixed by a statute other than title 5, U.S. Code.

Paragraph (3) of subsection (a) requires all employees eligible for coverage under new chapter 52 of title 5 to be so covered by the first day of the first pay period beginning on or after January 1, 2010, or on whatever earlier date the agency determines. The January 2010 deadline is made necessary by the sunset of the General Schedule in January 2010, as provided by section 503 of the bill. Within this timeframe, an agency may phase in coverage by establishing different effective dates for different categories of eligible employees and positions. Agencies must provide the Office with advance notice of the categories of employees to be covered and the effective date of their coverage.

Any strategic compensation system under chapter 52, whether it is the core strategic compensation system established under subchapters II-VIII of chapter 52 or an alternative strategic compensation system for a particular agency established under section 5209, necessarily includes a pay-for-performance system as defined in section 5205(21). A pay-for-performance system is defined as the policies and procedures under subchapter VI of chapter 52 or section 5209 for allocating performance pay increases.

Paragraph (3) of section 5202(a) provides that an employee who, under section 5202(a)(2), is eligible to be covered under chapter 52 may not become covered under a pay-for-performance system (established under subchapter VI or section 5209) unless and until that pay-for-performance system is certified by the Director of the Office as meeting the criteria set forth in new section 5257 of title 5. This means that, if an employee becomes covered by chapter 52 by operation of new section 5202(a) but is not covered by a pay-for-performance system that has been certified by the Director, such an employee would be covered by subchapters II-V, VII and VIII of chapter 52, but could not be covered by subchapter VI, which deals with performance pay increases. Nor could such an employee

be covered by any provisions of an alternative compensation system under section 5209 that were intended to replace the provisions of subchapter VI.

Subsection (b) of new section 5202 permits an agency, at its sole and exclusive discretion, to request that the Director of the Office extend coverage under chapter 52 to a category of employees who are not covered by subsection (a), provided that the Director has certified that those employees are subject to a pay-for-performance system that meets the requirements of section 5257. These otherwise excluded employees, whose agencies could decide to "opt" them into chapter 52, could nevertheless not be brought under any part of chapter 52 unless they were subject to a pay-for-performance system certified by the Director under section 5257. Coverage under this authority may be extended at any time, either before or after the sunset of the General Schedule.

Subsection (c) of new section 5202 is similar to subsection (b), but deals with employees in law enforcement positions. Subsection (c) permits the Director of the Office, on whatever effective date he or she determines appropriate, to extend coverage under chapter 52 to a category of employees who are not covered by subsection (a) and who are employed in law enforcement positions. Like employees referred to in subsection (b), chapter 52 coverage for these law enforcement employees would be contingent upon the employees in question being covered under a pay-for-performance system that the Director has certified as meeting the requirements of section 5257. Coverage under this authority may be extended at any time, either before or after the sunset of the General Schedule. However, if the employees in question are not covered under a certified pay-for-performance system, they may not become covered by any of the provisions of chapter 52.

Paragraph (2) of subsection (c) requires the Director, with the concurrence of the Attorney General and in consultation with other law enforcement agencies, to prescribe regulations defining "law enforcement position" for this purpose and gives the Director broad discretion in applying its definition. The Director's determination regarding whether a particular position meets the definition of "law enforcement position" is not reviewable by any third party. Paragraph (3) of subsection (c) requires the Director, with the concurrence of the Attorney General and after consulting other law enforcement agencies, to ensure consistency among rates of pay established under title 5 for law enforcement and related positions. Paragraph (4) of subsection (c) requires the Director to provide public notice of an extension of coverage under the subsection at least 6 months before that coverage determination takes effect.

Subsection (d) of new section 5202 states that the Director makes final determinations regarding the applicability of chapter 52 to any category of employees and positions, except for employees and positions of the Office of the Architect of the Capitol. This corresponds to a provision in existing section 5103 of title 5.

In new section 5203, subsection (a) provides that, notwithstanding any other provision of law, chapter 52 provisions preempt provisions in other laws for covered employees and positions. Affected provisions include chapter 51, chapter 53 (except as provided by section 5203(b)), and classification and pay provisions in laws otherwise covering

employees who become covered by chapter 52 by operation of section 5202(b) or (c). For example, the provisions of chapter 51 (Classification) would be "preempted" by the "Core Position Classification System" established under subchapter II of the new chapter 52 for covered employees and positions, even though chapter 51 would continue to apply to non-covered employees and positions until January 2010. Subsection (b) lists provisions of chapter 53 that are not preempted. These include sections of chapter 53 dealing with the pay of senior executives, certain senior-level and scientific and professional employees, and administrative law judges, as well as provisions governing critical pay authority and student loan repayments.

New section 5204 of title 5 establishes a general rule that, for the purpose of applying provisions of law and regulation that refer to preempted provisions of chapters 51 and 53, the references to those preempted provisions are deemed to be references to corresponding provisions in chapter 52. Exceptions to this general rule can be found in section 5204(b) or may be specified in regulations of the Director of the Office. Subsection (c) provides that, for a category of employees covered by chapter 52 in accordance with section 5202(b) or (c), the responsible agency, in coordination with the Director, may prescribe regulations governing the meaning of any references in law or regulation to provisions of the classification and pay system that previously applied to that category of employees.

New section 5205 of title 5 defines various terms used in chapter 52. The term "agency" is defined to include, in addition to Executive agencies as defined in 5 U.S.C. 105, the following legislative branch agencies: the Library of Congress, the Botanic Garden, the Government Printing Office, and the Office of the Architect of the Capitol. The definition also makes clear that agencies whose employees become covered by a joint decision of the Office and the agency under section 5202(b) or by a decision of the Office under section 5202(c) to extend coverage to them are also included in the definition of "agency." Section 5205 also defines numerous other terms that refer to the new compensation systems authorized by the new chapter. These include "alternative compensation system," "band," "basic pay," "career/occupational group," "career/occupational subgroup," "classification," "competencies," "core compensation system," "demotion," "local market supplement," "modal rating," "occupational series," "pay-for-performance system," "pay pool," "position," "promotion," "rate range," and "special market supplement."

New section 5206 of title 5 establishes a bar on collective bargaining regarding all aspects of any classification and pay system established under the authority of the chapter. This bar extends to pay-for-performance systems, which are defined as the policies and procedures established under subchapter VI or section 5209 for allocating performance pay increases, operating in conjunction with the performance appraisal system established under chapter 43 of title 5, to ensure that higher performance is rewarded with higher pay. This bar on collective bargaining applies regardless of any provisions of chapter 71 of title 5. Section 5206, in subsection (b), also makes clear that any system established under chapter 52 immediately supersedes any conflicting provision in a collective bargaining agreement, so that any such collective bargaining provision would become unenforceable immediately upon the establishment of the new chapter 52 system.

New section 5207 of title 5 requires that each agency with employees covered by the chapter provide employee representatives with an opportunity to participate, subject to regulations prescribed by the Director of the Office, in the development of agency implementing directives through discussion, written comments, or both. Employee representatives include, but are not limited to, representatives of labor organizations with exclusive recognition rights. The agency may determine the number of representatives and the timeframes for collaboration. Any written comments by employee representatives shall be forwarded to the agency official responsible for issuing the particular implementing directives. This continuing collaboration process would not change the fact that the agency continues to have the right to determine the content of implementing directives and when they take effect.

New section 5208 of title 5 describes the responsibilities of the Director of the Office and agencies in administering the chapter. The Director is required to prescribe regulations to carry out the purpose of the chapter, including (except as otherwise provided by law) the purposes for which pay under any provision of chapter 52 is considered part of basic pay. Agencies are authorized to prescribe implementing directives to apply the chapter and regulations of the Director. Each agency must provide the Office with whatever information the Director requires. The Director must prescribe rules governing conversion of positions and employees into a strategic compensation system established under chapter 52 as a result of a coverage determination under section 5202. The conversion may not cause a reduction in an employee's rate of basic pay. If the Director determines that a pay-for-performance system does not meet the requirements for certification under new section 5257, the Director must order the agency to take whatever corrective action is required to bring the system into compliance with the criteria prescribed in section 5257. If appropriate, the Director may rescind any previous certification of a pay-for-performance system and direct the agency to implement an appropriate system. Section 5208 requires any agency to take whatever action the Director prescribes. If the Director rescinded a previous certification and the agency failed to take the prescribed corrective action to implement a certifiable system, the affected employees would remain covered by the provisions of chapter 52 other than subchapter VI (or the provisions of an alternative strategic compensation system established under section 5209 that were designed to replace subchapter VI).

New section 5209 of title 5 permits agencies to establish, and from time to time adjust, alternative strategic compensation systems for one or more categories of its employees, with the approval of the Director and subject to the Director's certification under section 5257 of the pay-for-performance system covering those employees. Section 5209 makes clear that any alternative strategic compensation system established under that section necessarily includes a pay-for-performance system as defined in section 5205(21), and that any such pay-for-performance system takes effect on the date the Director of the Office certifies that system as meeting the requirements of section 5257. These alternative systems may vary in certain respects from the core strategic compensation system established under subchapters II through VIII of chapter 52. Before establishing or adjusting an alternative system, an agency will have to publish a notice in the *Federal Register* describing the proposed system and provide for a public comment period of at

least 30 days. The agency also will be required to meet and confer about the proposed system for at least 30 days with representatives of labor organizations that have national consultation rights and that represent employees who would be affected by the proposed system. Those representatives may provide written comments, which would be forwarded to the head of the agency (or the agency head's designee) for consideration in making final agency decisions. The alternative system may not take effect earlier than 30 days after publication of a final notice in the *Federal Register*. This process, which is unaffected by any provisions of chapter 71 of title 5, is the exclusive process by which employee representatives may participate in the creation or modification of an alternative strategic compensation system. The Director may establish one or more interagency advisory groups to facilitate interagency communication and consultation regarding alternative strategic compensation systems. It is envisioned that agency Chief Human Capital Officers would be represented on these advisory groups.

Subchapter II of chapter 52 – Core Position Classification System

Subchapter II of the new chapter 52 of title 5 consists of sections 5211 through 5215.

New section 5211 of title 5 requires the Director to establish a core position classification system, to be published in whatever form he or she determines. Agencies are required to provide the Office with information and cooperation in developing the occupational structure. The Director, after consulting with agencies to the extent it determines necessary, may establish, revise, or abolish official position titles, career/occupational groups, subgroups, or bands. The Director may make whatever inquiries or investigations of positions it considers necessary.

New section 5212 of title 5 requires the Director to apply occupational series established under subchapter II of chapter 21, as added by section 104 of the draft bill. The Director will also define career/occupational groups (groupings of occupations), subgroups, and associated bands (levels of work) for those groups. Each career/occupational group may include, but is not limited to, bands for entry/developmental work, full performance work, senior expert work, and supervisory work.

New section 5213 of title 5 requires each agency to classify each position under its jurisdiction into the appropriate occupational series, career/occupational group, subgroup (if applicable), and band in conformance with standards published by or coordinated with the Director of the Office. If there are no published standards that are directly applicable, the classification must be consistent with published standards. An agency may change the classification of a position as warranted.

New section 5214 of title 5 authorizes the Director to review an agency's classification of positions and to order corrective action, where necessary, with respect to the placement of one or more positions in the appropriate pay system, series, occupational group (and subgroup, where appropriate), and band, or with respect to the official title of a position. Agencies are required to take any corrective action prescribed by the Director. When the Director finds that positions are not being classified in conformance with, or consistent

with, published standards, he or she may limit, revoke, or suspend an agency's authority under section 5213 to classify positions. When exercising this authority, the Director may either require the agency to secure the Director's approval before effecting a classification action or exercise the agency's classification authority directly. The Director may restore the agency's authority to classify positions whenever he or she is satisfied that the agency's subsequent classification actions will be in conformance with, or consistent with, published standards.

New section 5215 of title 5 permits an employee, subject to regulations of the Director of the Office, to request reconsideration of the classification of the employee's official position of record with respect to the assigned pay system, career/occupational group, subgroup, occupational series, official title, or band. The reconsideration request may be filed with the agency or with the Office. An employee may ask the Director to review an agency reconsideration decision. The decision of the Director is final and not subject to further review or appeal. An agency reconsideration decision is also considered to be final and not subject to further review or appeal if the employee does not request reconsideration by the Director.

Subchapter III of chapter 52 – Core Pay System

Subchapter III of the new chapter 52 of title 5 consists of sections 5221 through 5223 and includes general provisions related to the core pay system.

Section 5221 requires the Director to establish a core pay system consistent with the core classification system established in subchapter II and the pay provisions in subchapters III through VIII. Performance-based pay must be linked to employees' ratings of record.

New section 5222 of title 5 bars an agency from paying a covered employee an annual rate of basic pay in excess of the rate for level III of the Executive Schedule unless a higher rate is approved under the critical pay authority in section 5377. The section also states that employees are subject to the aggregate pay limit in section 5307, which is not preempted. (See section 5203(b).)

New section 5223 of title 5, U.S. Code, requires the Office to establish a 16-member Federal Pay Council, with 1 official of the Office serving as the Chair, 3 experts, 6 employee representatives, and 6 management representatives appointed from among members of the Chief Human Capital Officers Council. Members are not paid for their service on the Council. The Federal Pay Council will provide the Directors of the Office and the Office of Management and Budget with views and recommendations regarding setting and adjusting band rate ranges, establishing and modifying local market areas, and the methodology for determining the amounts of local market supplements.

Subchapter IV of chapter 52 – Core Pay System; Pay Structure

Subchapter IV of the new chapter 52 of title 5 (sections 5231-5234) deals with the pay structure of the core pay system, including employee eligibility for individual pay adjustments based on adjustments in rate ranges.

New section 5231 requires each pay band established under subchapter II of chapter 52 to be associated with a range of rates of basic pay, to be expressed as annual amounts. Each range is defined by a minimum and a maximum rate. For each band, the Director will establish a common base rate range that applies in all locations worldwide (before applying any supplements established under subchapter V). The Director may, in regulations, prescribe pay progression policies (or allow agencies to establish such policies) which could apply either to an entire rate range or a portion of a rate range and which would take into account differences among employees' competencies, performance, organizational levels, or other appropriate factors.

New section 5232 of title 5 requires the Director of the Office to set and adjust rate ranges after consulting with agencies and securing the concurrence of the Office of Management and Budget. In addition, the Director may not set and adjust rate ranges for law enforcement positions (as defined in section 5202(c)) without the concurrence of the Attorney General. The Director is required to make a determination annually regarding whether to adjust rate ranges and by what amount, if any. It may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and any other relevant factors. The Director determines the effective dates of rate ranges. The Director may provide different adjustments for different bands and may adjust band minimum and maximum rates by different percentages.

New section 5233 of title 5 states that, when the minimum rate of a band is adjusted, employees with a fully successful performance rating are entitled to a basic pay increase equal to the percentage increase in that minimum rate, as long as their rate of basic pay does not exceed the maximum rate of the range. However, this rule does not apply to employees receiving a retained rate. (See section 5266.) Employees with a performance rating below fully successful are prohibited from receiving a pay increase, except as provided by sections 5234 and 5235. Since such an employee's rate is frozen while the band minimum is increasing, the employee's rate may fall below the band minimum. An employee who does not have a rating of record for the appraisal period most recently completed will be treated the same as employees who received a fully successful rating of record for that period.

New section 5234 of title 5 concerns employees who are denied an increase under section 5233 because of performance below the fully successful level. Subsection (a) addresses such employees whose rate of basic pay does not fall below the minimum rate of the band as a result of that rating. If the agency later gives such an employee a new rating of record of fully successful or higher (after the effective date of the section 5233 adjustment at issue and before the next section 5233 adjustment), the employee is entitled to an increase effective on the first day of the first pay period beginning on or after the date the new

rating is final. The increase must be the same amount as the increase received by an employee with a fully successful or higher rating under section 5233.

Subsection (b) of section 5234 deals with employees who are denied an increase under section 5233 because of performance below the fully successful level and whose rate of basic pay falls below the minimum rate of the band. In this situation, the agency must either (1) initiate action within 90 days to demote or remove the employee or (2) if the employee demonstrates fully successful or higher performance within 90 days, issue a new rating of record and provide a prospective pay increase, consisting of the same dollar amount the employee would have received if he or she had been rated fully successful or higher at the time of the rate range adjustment. If the agency fails to take any action, the employee is entitled to the minimum rate of the band effective on the first day of the first pay period beginning on or after the 90th day following the effective date of the adjustment of the minimum rate.

Subchapter V of chapter 52 – Core Pay System; Local and Special Market Supplements

Subchapter V of the new chapter 52 of title 5 (sections 5241-5246) addresses local and special market supplements, including employee eligibility for individual pay adjustments based on market supplement adjustments.

New section 5241 of title 5 sets forth general provisions related to local and special market supplements. These supplements are expressed as a percentage of an employee's rate of basic pay. Regulations of the Director of the Office will prescribe the extent to which these supplements apply to employees receiving a retained rate under section 5266.

New section 5242 of title 5 permits the Director to establish local market supplements (subject to section 5244) that may vary by career/occupational group, band, and location. These local market supplements are similar to locality-based comparability payments currently authorized under section 5304. The supplements apply only to employees whose official duty station is located in a particular local market area. The Director is authorized to establish and modify local market area boundaries by regulation. Subsection (c) identifies the purposes for which local market supplements may be treated as basic pay. The listed purposes include all the purposes for which locality-based comparability payments under section 5304 are treated as basic pay—for example, retirement, life insurance, and premium pay.

New section 5243 of title 5 permits the Director to establish special market supplements (subject to section 5244) that provide higher pay levels for specified categories of employees if the Director determines that such supplements are warranted by current or anticipated recruitment or retention needs, or both. A special market supplement replaces any lower local market supplement that would otherwise be applicable. A special market supplement is treated as basic pay for the same purposes as a local market supplement and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under section 5941 of title 5, and for any other purposes specified in regulations of the Director.

New section 5244 of title 5 places certain limits on the Director's authority to set and adjust local and special market supplements. The Director must consult with affected agencies before setting and adjusting local and special market supplements. Section 5244 further requires the Director to obtain the concurrence of (1) the Office of Management and Budget before setting and adjusting local market supplements and (2) additionally, the Attorney General before setting and adjusting local market supplements for law enforcement positions (as defined in section 5202(c)). In determining the amount of these supplements, the Director may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and any other relevant factors that pertain to the covered category of employees. In evaluating labor market conditions, the Director will take into account any allowances and differentials under 5 U.S.C. chapter 59 payable to employees outside the 48 contiguous States. The Director determines the effective dates of newly set or adjusted supplements.

New section 5245 of title 5 states that, when a local or special market supplement is increased, employees with a fully successful performance rating are entitled to a basic pay increase resulting from that supplement increase. Employees with a performance rating below fully successful are prohibited from receiving a pay increase because of a supplement increase, except as provided by section 5246, and failure to receive a supplement increase is not appealable as an adverse action under chapter 75 of title 5. Since these employees' supplement-adjusted rates are frozen while the supplement-adjusted band minimum is increasing, their adjusted rates may fall below the adjusted band minimum. An employee who does not have a rating of record for the most recently completed appraisal period will be treated the same as employees who received a fully successful rating of record for that period for purposes of entitlement to a supplement adjustment.

New section 5246 of title 5 addresses (in subsection (a)) employees who are denied an increase under section 5245 because of performance below the fully successful level and whose rate of basic pay (including a local or special market supplement) does not fall below the minimum adjusted rate of their band. If the agency later gives such an employee a new rating of record of fully successful or higher (after the effective date of the section 5245 adjustment at issue and before the next section 5245 adjustment), the employee is entitled to the new, higher supplement effective on the first day of the first pay period beginning on or after the date the new rating is final.

Section 5246 also addresses, in subsection (b), the treatment of employees who are denied an increase under section 5245 because of performance below the fully successful level and whose rate of basic pay (including a local or market supplement) falls below the minimum adjusted rate of the band. In this situation, the agency must either (1) initiate action within 90 days to demote or remove the employee or (2) if the employee demonstrates fully successful or higher performance within 90 days, issue a new rating of record and provide a prospective pay increase (in the same manner as described in subsection (a)). If the agency fails to take any action, the employee is entitled to the minimum adjusted rate of the band effective on the first day of the first pay period

beginning on or after the 90th day following the effective date of the supplement adjustment.

Subchapter VI of chapter 52 – Core Pay System; Performance-Based Pay

Subchapter VI of the new chapter 52 of title 5 (sections 5251-5257) establishes the framework for performance-based pay adjustments.

Section 5251 sets forth the purpose of subchapter VI. Subchapter VI authorizes performance-based pay adjustments and cash awards as part of the core pay system which, operating in conjunction with the performance appraisal system established by chapter 43, as amended by the bill, constitutes a pay-for-performance system. The provisions of subchapter VI are designed to ensure that higher performance is rewarded with higher pay.

New section 5252 of title 5 establishes rules regarding performance pay increases. Subsection (a) makes employees in a Full Performance or higher band eligible for within-band performance-based pay increases. Based on performance ratings of record, employees shall be assigned performance shares, which represent shares or units of pay pool funds. If an employee is eligible to receive a rating but no rating has been assigned, the agency must use the modal rating for the most recently completed appraisal period—that is, the rating of record received most frequently by employees in the same pay pool. Agencies will have to develop their own policies to address the situation of an employee who is not eligible for a rating of record for some reason other than those addressed in section 5267(f) or (g) (having to do with certain employees who return from periods of military service or after receiving workers' compensation payments).

Subsection (b) of new section 5252 requires agencies to establish pay pools for allocating performance pay increases. Agencies determine which employees are covered by any pay pool and determine the dollar value of each pay pool. In setting the value of pay pools, for the first 5 years after converting to a pay-for-performance system under chapter 52, agencies must allocate an amount for performance pay increases equal to or greater than the Governmentwide historical average value of within-grade and quality step increases under the General Schedule, as well as the estimated average amount that otherwise would have been spent on promotions between General Schedule grades that are placed in the same band. The Director of the Office determines this amount. After the first 5 years, agency heads will determine annually the funds to be allocated to performance pay increases, subject to any minimum amount the Director may prescribe. Subject to regulations of the Director, agencies may distribute among pay pools the funds allocated for performance pay increases and, in so doing, may take into account organizational performance and contribution to agency missions.

Subsection (c) of new section 5252 requires agencies to establish rating/share patterns for each pay pool—that is, the relationship between a summary rating level and a single number of shares or a range of shares. A higher rating must receive a greater number of shares. For example, in a rating program with four summary rating levels (outstanding, exceeds fully successful, fully successful, and unacceptable), one possible rating/share

pattern (using a single number of shares for each rating level) would be 4-2-1-0, where 4 shares are assigned to the outstanding rating, 2 shares to the exceeds fully successful rating, 1 share to the fully successful rating, and 0 shares to the unacceptable rating. An agency must assign 0 shares to any rating below fully successful since no pay increase is payable to employees with such a rating. If a rating/share pattern associates a rating with a range of shares, the agency must specify the criteria to be used in assigning employees a specific number of shares within the range. An agency may, for any pay pool, adopt a method of adjusting shares based on an employee's position in the rate range.

Subsection (d) of new section 5252 requires agencies to determine the value of one performance share, expressed as a percentage of the employee's rate of basic pay or as a fixed dollar amount, based on the value of the pay pool and the distribution of shares among pay pool employees. An individual employee's performance pay increase is determined by multiplying the determined value of a performance share by the number of shares assigned to the employee. On the effective date specified by the agency, this amount must be paid as an increase in the employee's rate of basic pay, but only to the extent that it does not cause the employee's rate to exceed the maximum of the employee's rate range (or any applicable limitation established under section 5231(c)). At the agency's discretion, any portion of the employee's performance pay increase amount not converted to a basic pay increase may be paid out as a lump-sum payment (with no charge to the pay pool). Such a lump-sum payment is not basic pay for any purpose. An employee receiving a retained rate under section 5266 is not eligible for a basic pay increase under section 5252 but may receive a lump-sum payment, subject to the condition that the lump-sum payment may not exceed the amount received by an employee in the same pay pool and band whose rate was at the band maximum and who was assigned the same number of performance shares.

Subsection (e) of new section 5252 requires each agency to issue implementing directives regarding the proration of performance pay increases for employees who, during the period between performance pay increases, were (1) hired or promoted, (2) in leave-without-pay status, or (3) in other circumstances that make proration appropriate.

Subsection (f) of new section 5252 states that the agency must apply section 5252 in a manner consistent with section 5267(f) or (g), as applicable, for employees who return to service after periods of leave without pay or separation caused by an on-the-job injury or military service.

Subsection (g) of new section 5252 states that, regardless of any other provision in section 5252, an agency may establish an alternative method for awarding performance pay increases, after coordination with the Director of the Office. An agency alternative method must include, at a minimum, certain elements listed in subsection (g), including a bar on pay increases for employees with a rating below fully successful, at least one summary rating level of performance above fully successful with higher pay increases for higher performance levels, and a salary cost management method.

New section 5253 of title 5 allows an agency to reduce an employee's rate of basic pay within a band for unacceptable performance or conduct, subject to any applicable adverse action procedures as set forth in chapter 75 of title 5. Such a reduction may not exceed 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's band rate range.

New section 5254 of title 5 permits an agency to provide special within-band basic pay increases for employees within a Full Performance or higher band who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment, or in other circumstances determined by the agency. These increases may be revoked when the agency determines that the conditions of this section are no longer met. Such a revocation is not considered an adverse action under chapter 75 and does not create an entitlement to pay retention.

New section 5255 of title 5 authorizes each agency to develop pay progression policies and procedures for employees in Entry/Developmental bands that are linked to employees' acquisition and demonstration of competencies and other relevant factors, in accordance with regulations of the Director of the Office.

New section 5256 of title 5 permits the payment of a lump-sum cash award under chapter 52, either to an individual employee or to a group of employees, based on an employee's most recent rating of record (in the case of an individual award) and any other performance assessment or criteria the agency believes to be appropriate. The same rating of record, assessment, or criteria may not serve as a basis for both an award under section 5256 and either an award under section 4503 for superior accomplishment or a performance-based cash award under section 4505a. An award under section 5256 in excess of 20 percent of basic pay, including any local or special market supplement, must be approved by the agency head. Lump-sum cash awards under section 5256 may not be paid from funds allocated for the payment of performance pay increases under section 5252.

New section 5257 of title 5 requires that, before an agency may implement a pay-for-performance system under subchapter VI of new chapter 52 or under new section 5209 with respect to a category of employees, that pay-for-performance system must be certified by the Director of the Office as meeting the requirements of section 5257. The section requires that pay-for-performance systems include the following elements: (1) adherence to the merit system principles in 5 U.S.C. 2301; (2) a fair, credible, and transparent employee performance appraisal system; (3) linkage among the pay-for-performance system, the performance appraisal system, and the agency's strategic plan; (4) a mechanism for ensuring employee involvement in the design and implementation of the pay-for-performance system; (5) recurring training of supervisors, managers, and employees in the operation of the system; (6) a process for ensuring ongoing feedback and dialogue among supervisors and employees about performance; (7) measures to ensure that management of the system will be fair and performance-based; and (8) a mechanism to ensure that the system is adequately resourced.

Subsection (b) of new section 5257 prescribes a process an agency must follow in conferring with representatives of certain labor organizations representing employees affected by the establishment of a pay-for-performance system. The process, which also requires publication of a Federal Register notice regarding a proposed pay-for-performance system, must also be followed with respect to any proposal for a substantive modification of a previously certified pay-for-performance system.

Subchapter VII of chapter 52 – Core Pay System; Pay Administration

Subchapter VII of the new chapter 52 of title 5 (sections 5261-5267) addresses miscellaneous pay administration matters such as setting starting pay, promotions, demotions, and pay retention.

Section 5261 requires each agency, after coordination with the Director of the Office, to issue implementing directives regarding the setting of starting rates of pay for employees who are newly placed in a band.

New section 5262 of title 5 permits each agency to issue implementing directives, consistent with regulations of the Director, regarding the discretionary use of an individual's highest previous Federal rate of pay in setting pay in conjunction with various personnel actions such as reemployment, promotion, or transfer.

New section 5263 of title 5 provides that, upon promotion, an employee is entitled to a pay increase in accordance with regulations prescribed by the Director. In administering this section, the Director may provide for a minimum pay increase upon promotion in specified circumstances. The rate of basic pay after promotion may not be less than the minimum rate of the higher band.

New section 5264 of title 5 permits each agency to issue implementing directives regarding the setting of an employee's rate of basic pay upon demotion to a lower band. The agency directives, which must be consistent with regulations of the Director, must distinguish between demotions under adverse action procedures and other reductions in band or pay. A reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

New section 5265 of title 5 permits each agency to issue implementing directives regarding the setting of an employee's rate of basic pay upon movement to a position in a different career/occupational group or subgroup, subject to regulations prescribed by the Director.

New section 5266 of title 5 requires the Director of the Office to prescribe regulations regarding eligibility for pay retention of employees whose rate of basic pay would otherwise be reduced. The regulations also will address how to apply pay retention to eligible employees. For employees receiving a retained rate (that is, a rate that exceeds the maximum rate of the employee's band), the retained rate must be adjusted at the time of any increase in the minimum rate of the employee's band by one-half of the percentage

value of any increase in that minimum rate for which the employee otherwise would have been eligible under section 5233.

New section 5267 of title 5 includes miscellaneous pay administration provisions. Subsection (a) states that an employee's rate of basic pay may not be less than the minimum rate (or adjusted minimum rate) of the employee's band, except in the case of an employee who is denied a pay increase under section 5233 or 5245 because of a rating of record below fully successful.

Subsection (b) of new section 5267 bars an employee's rate of basic pay from exceeding the maximum rate of the employee's rate range unless the employee is receiving a retained rate under section 5266.

Subsection (c) of new section 5267 requires each agency to follow the rules for establishing pay periods and computing rates of pay in sections 5504 and 5505, as applicable.

Subsection (d) of new section 5267 states that each agency may issue implementing directives regarding the movement of employees to or from a band with a rate range that is increased by a special market supplement. Any such implementing directives must be consistent with regulations prescribed by the Director of the Office.

Subsection (e) of new section 5267 requires the Director to establish representative rates for all rate ranges, for the purpose of applying reduction-in-force provisions.

Subsection (f) of new section 5267 addresses setting pay prospectively for employees who return to service with restoration rights after performing service in the uniformed services. Agencies may issue implementing directives on setting pay for such employees, consistent with regulations of the Director. The agency must credit such an employee with any applicable intervening rate range adjustments under section 5233, developmental adjustments under section 5255, and performance pay increases under section 5252 (based on the employee's last rating of record if available or on the modal rating received by employees covered by the same pay pool for the most recently completed appraisal period). For such an employee, a performance pay increase (including the first increase processed after the employee's return to civilian service) may not be prorated.

Subsection (g) of new section 5267 addresses setting pay prospectively for employees who return to service after a period of receiving workers' compensation payments. The entitlements of such an employee are exactly the same as those provided to an employee subject to subsection (f).

Subchapter VIII of chapter 52 – Core Pay System; Special Payments

Subchapter VIII of the new chapter 52 of title 5 authorizes (in section 5271) certain special payments for special skills or assignments and for situations where agencies are experiencing recruitment and/or retention problems. Section 5271 authorizes certain

special payments (differentials or lump sums) that are not basic pay for any purpose. Accordingly, these special payments may be terminated or reduced at any time without triggering pay retention or adverse action procedures. Agencies may determine the amount of the payments and the conditions of eligibility, including any performance or service agreement requirements. Section 5271 authorizes payments for special skills or specializations for which employees are trained and ready to perform at all times, payments for employees serving on special assignments in positions placing significantly greater demands on the employees than other assignments in the same band, and payments for employees serving in positions for which the agency is experiencing or anticipating significant recruitment or retention problems, or both.

Additional compensation amendments

Section 203 of the bill contains various amendments to chapters 51, 53, 54, and 55 of title 5, United States Code.

Paragraph (1) would amend chapter 53 of title 5.

Paragraph (1)(A) would amend section 5304 of title 5, relating to locality-based comparability payments. Paragraph (1)(A) would make necessary changes to 5 U.S.C. 5304(g)(2) and (h) to conform these provisions to amendments made elsewhere in the bill affecting senior-level ("SL") employees and employees in scientific and professional positions ("ST"). The amendments made by paragraph (1)(A) would, in effect, remove these SL/ST employees from provisions entitling them to locality-based comparability payments under section 5304. The provisions of current law that entitle these employees to locality-based comparability payments also have the effect of limiting their basic pay, including those locality-based payments, to the rate for level III of the Executive Schedule. Under this amendment, they, like members of the Senior Executive Service, will potentially have access to a higher limit on basic pay (level II of the Executive Schedule) See also the amendment to section 5376 that would be made by paragraph (1)(D).

Paragraph (1)(A) also would eliminate the requirement in section 5304(h) for reapproving locality pay extensions for non-General Schedule (GS) employees each year. Instead, an extension of locality pay would remain in effect until terminated by the President (or the President's designee). In addition, section 5304(h) would be amended to delete the requirement that the President send a detailed report to Congress providing justification for the extension of locality pay to categories of non-GS employees in more than one agency.

Paragraph (1)(B) would amend section 5307 of title 5, United States Code, relating to the aggregate limitation on pay. That paragraph would amend section 5307(a)(2) to provide that back pay is excluded from the aggregate limitation on pay only to the extent that it was awarded for a period in a previous calendar year. Back pay for a period in the current calendar year would appropriately count toward the aggregate limitation. Paragraph (1)(B) also would amend subsection (d)(3)(B) of section 5307 to provide that certification of an agency's performance appraisal system for purposes of authorizing it to apply a higher aggregate limitation (the Vice President's salary) under section 5307 would be in effect for

24 months beginning on the date of certification and could be extended by the Director of the Office for up to 6 months. The current provision specifying that the certification is in effect for 2 calendar years has placed agencies at an unintended disadvantage when their appraisal systems are certified near the end of a calendar year.

Paragraph (1)(C) of section 203 of the draft bill would amend section 5334 of title 5, United States Code, to provide agencies with discretionary authority to provide a promotion pay increase for employees who leave a non-GS Federal pay system to take a higher-level position in the GS pay system. Such movements will be more common as more and more agencies establish non-GS pay systems under this Act or other authorities. Under current law, a GS employee may receive a promotion increase only upon promotion from another GS position. This amendment allows, but does not require, the gaining agency to provide such an employee with a pay increase that is a close approximation of the pay increase to which the employee would have been entitled if he or she had made exactly the same kind of movement between two positions that both happened to be under the General Schedule pay system. Without this amendment, there would be no mechanism for recognizing – in the form of a pay increase – the fact that the employee was, in effect, being promoted. The need for and use of this authority will end upon the sunset of the General Schedule in 2010.

Paragraph (1)(D) of section 203 of the draft bill would amend section 5376 of title 5, which currently applies to pay for certain senior-level positions, to extend the section to apply also to scientific and professional positions established under section 3104. The amendment would increase the minimum rate of basic pay for these positions from 120 percent of the minimum rate payable for GS-15 to 85 percent of the rate for level V of the Executive Schedule. The amendment also would increase the ceiling on the rate of basic pay for such employees from level IV to level III of the Executive Schedule. Notwithstanding this new limit, the amendment would also provide that, for senior-level and scientific and professional positions established under section 3104 who are covered by a performance appraisal system that has been certified under section 5307 of title 5 as making meaningful distinctions based on relative performance, the cap on basic pay would be level II of the Executive Schedule. These provisions parallel provisions enacted by Public Law 108-136 with respect to members of the Senior Executive Service.

Paragraph (1)(E) would amend section 5379 of title 5, United States Code, to provide the Office with greater flexibility in administering the student loan repayment program. The Director of the Office would be authorized to set certain limits and rules by regulation. For example, under current law, caps on student loan repayment benefits are fixed dollar amounts. This amendment allows the Director to adjust those caps over time. Also, current law requires a fixed 3-year service agreement in all cases, even when the benefits provided are relatively small. This amendment allows the Director to provide agencies with more flexibility in setting the service period, taking into account the level of benefits provided. The amendment also provides that noncareer appointees in the SES are not eligible for student loan repayment benefits, consistent with the exclusion of other political appointees.

Paragraph (1)(F) of section 203 of the draft bill would amend section 5382(b) of title 5, United States Code, to define the minimum rate of basic pay for members of the SES as the rate that is 85 percent of the rate for level V of the Executive Schedule. Under current law, the SES minimum rate is set at the minimum rate for senior-level and scientific or professional (SL/ST) employees under section 5376 of title 5—i.e., 120 percent of the minimum rate for GS-15. Since the General Schedule pay system will be eliminated by January 2010 under this bill, a new reference rate is needed to establish the SES minimum rate. Under the effective date provisions in Title V of the bill, this amendment would take effect on the first day of the first pay period beginning on or after January 1, 2010.

Paragraph (2) of section 203 of the bill would repeal chapter 54 of title 5, United States Code. Chapter 54 (Human Capital Performance Fund) was added by section 1129 of Public Law 108-136, November 24, 2003. Due to lack of sufficient funding, this provision has never been implemented. Given the significant pay-for-performance provisions in chapter 52, as added by this Act, the chapter 54 authority is no longer needed.

Paragraph (3) of section 203 of the bill would amend provisions of chapter 55 of title 5 concerning premium pay, severance pay, and back pay.

Paragraph (3)(A) would amend section 5541(2)(iii) of title 5, United States Code, to provide that Executive Schedule officials (or equivalent) are not covered by the premium pay provisions in subchapter V of chapter 55. This is consistent with the exclusion of agency heads and members of the SES.

Paragraph (3)(B) would amend section 5548 of title 5, United States Code, to allow the Director of the Office to establish, by regulation, alternative premium pay provisions in lieu of the provisions in subchapter V of chapter 55. This would provide flexibility to address mission-specific needs and requirements for specific agencies or occupations. The Director would issue regulations establishing any alternative premium pay provisions, identifying covered categories of employees, and determining the purposes for which any alternative premium payment is considered basic pay under various title 5 provisions, such as retirement provisions. Section 5548, as amended, also would allow the Director (regardless of any other provision of law) to apply subchapter V of chapter 55 to employees in law enforcement positions, as defined in section 5202(c)(2). This authority would include the authority to apply any applicable alternative provisions to subchapter V of chapter 55 that the Director established under section 5548, in lieu of statutory provisions that would otherwise apply.

Paragraph (3)(C) of section 203 of the draft bill would amend section 5595 of title 5, United States Code, regarding severance pay eligibility, to address longstanding problems.

Clause (i) of paragraph (3)(C) would amend 5 U.S.C. 5595(a)(2)(i) to provide that all employees paid above the rate for level II of the Executive Schedule are excluded from severance pay eligibility. Current law excludes those whose rate exceeds the "maximum" rate for the Executive Schedule; however, the House Committee print of title 5 erroneously refers to the "minimum" rate. The maximum rate of pay for members of the SES

(including the FBI-DEA SES) is the rate for level II of the Executive Schedule. Thus, while the amendment deletes language regarding SES members, it does not affect SES eligibility for severance pay.

Clause (i) also would amend section 5595(a)(2)(ii)of title 5 to exclude from severance pay eligibility all employees serving under a time-limited appointment, regardless of whether such an appointment follows a permanent appointment without a break in service. Under current law, an employee can voluntarily separate from a permanent appointment, immediately take a time-limited appointment, and receive severance pay upon expiration of the time-limited appointment, which is contrary to the intent of limiting severance pay to those who are separated for reasons beyond their control.

Clause (ii), however, would amend 5 U.S.C. 5595(b) to provide that an involuntary movement from a permanent appointment to a time-limited appointment without a break in service is considered an involuntary separation for severance pay purposes. Severance payments would be suspended during the time-limited appointment as described in amended section 5595(d) of title 5.

Clause (iii) of section 203(3)(C) of the bill would amend section 5595(d) of title 5 to provide that payments of severance pay are temporarily suspended, not terminated, during any time-limited appointment. This rule already applies under current regulations of the Office to time-limited appointments other than those that immediately follow a permanent appointment. With the changes made in 5 U.S.C. 5595(a)(2)(ii) and (b), the suspension rule would apply to all time-limited appointments.

Paragraphs (4) and (5) of section 203 would amend the Civil Service Retirement law and the Federal Employees' Retirement law, respectively, to permit an employee who is contributing to the Thrift Savings Fund from his or her basic pay to also contribute to that Fund all or any part of an award, bonus, or lump-sum payment under section 5252 of title 5, as added by this bill. No employee would be entitled to any matching funds from his or her employing agency based on any contributions authorized by these amendments.

TITLE III. STAFFING MODERNIZATION.

Title III of the bill would update provisions of title 5, U.S. Code, relating to hiring.

Chapter 31 of title 5 – Authority for Employment

Section 301 would amend chapter 31 of title 5.

Paragraph (1) of that section would amend 5 U.S.C. 3101 concerning employment authorities and types of appointments to consolidate the categories of appointments into two broad categories – career and time-limited, thereby eliminating career–conditional appointments. The amended section 3101 provides definitions of career and time-limited appointments.

The term "time-limited appointment" is meant to include appointments currently designated as temporary and term appointments. Career appointments will be used when the need for an employee's services is expected to continue. The Director of the Office of Personnel Management will prescribe regulations on the duration and appropriate uses for time-limited appointments and the conditions under which time-limited employees may be selected for career appointments without further competition.

Paragraph (2) of section 301 of the bill would amend section 3104 of title 5, U.S. Code, to broaden the current authority of the Office relating to the establishment and revision of the maximum number of positions for carrying out research and development functions by specially qualified scientific and professional "(ST") personnel. The amendment would extend these provisions to senior-level positions (known as "SL") as well as "ST" positions. The new subsection (a) of section 3104 allows the Director of the Office to establish and revise standards and procedures for classifying positions as "SL" or "ST."

Paragraph (3) of section 301 of the bill would repeal section 3108 of title 5, which bars the employment of the Pinkerton Detective Agency or similar organizations by the Federal Government and the government of the District of Columbia. This is an antiquated provision that has no place in a statute governing Federal hiring in the 21st century.

Paragraph (4) of section 301 of the bill would amend section 3109 of title 5 to clarify that experts and consultants are appointed as Federal employees under that section rather than providing services by contract. Amended section 3109 clarifies that experts and consultants may be paid on an hourly or daily basis and raises the limitation on pay of experts and consultants from the maximum rate for GS-15 to the rate for level III of the Executive Schedule, in addition to eliminating the requirement that agencies provide special annual reports on experts and consultants to the Office.

Paragraph (5) of section 301 would repeal section 3112 of title 5, which is no longer needed because section 302 of the draft bill essentially would incorporate the text of the current section 3112 in chapter 33 of title 5. This provision authorizes the noncompetitive appointment of a disabled veteran who has a compensable service-connected disability of 30 percent or more. Chapter 33 is a more appropriate place to establish this authority.

Paragraph (6) of section 301 would amend section 3133 of title 5 by adding a new subsection (f) to authorize the Director of the Office to establish standards for classifying SES positions, as currently provided in section 5108(a)(2). This authority would be moved to chapter 31, as these positions are excluded from the new chapter 52.

Paragraph (6) also would add a new subsection (g) to 5 U.S.C. 3133 to retain the President's authority to establish standards for classifying SES positions in the Federal Bureau of Investigation and Drug Enforcement Administration, as currently provided in section 5108(b), and to determine the maximum number of these positions. This authority is moved to chapter 31, as these positions are excluded from the new chapter 52.

Paragraph (7) of section 301 would make a technical, conforming amendment in 5 U.S.C. 3151(a)(4).

Paragraph (8) of section 301 would amend the table of sections for chapter 31 of title 5 to reflect the amendments made by the preceding paragraphs of the section.

Chapter 33 of title 5 – Examination, Selection, and Placement

Section 302 of the bill would amend chapter 33 of title 5, United States Code, to replace subchapter I, create a new subchapter II, redesignate the current subchapters II through VIII as subchapters III through IX, renumber the sections, and update provisions relating to Federal hiring processes.

Paragraph (1) of section 302 would redesignate subchapters II through VIII of chapter 33 as subchapters III through IX, respectively.

Paragraphs (2) and (3) of section 302 would, in subchapter I of 5 U.S.C. chapter 33, combine current sections 3301 and 3302 into a new section 3301, entitled "Civil service employment." Paragraph (3) also would make conforming changes in the amended section 3301(b) which are made necessary by the renumbering of certain sections of the chapter.

Paragraph (4) of section 302 would redesignate sections 3303 and 3304 of title 5 as sections 3302 and 3303, respectively.

Paragraph (5) of section 302 would change the title of the redesignated section 3302 to "Recommendations of Senators and Representatives." The section bars an individual who is considering or appointing an applicant for employment in the competitive civil service from receiving or considering a recommendation by a Senator or Representative, except regarding the applicant's character or residence.

Paragraph (6)(A) of section 302 would rename redesignated section 3303 as "Competitive service; examinations" and would amend subsections (a) through (e) of that section. Paragraph (6)(B) of section 302 would make technical, conforming changes.

Section 3303, as redesignated and renamed, clarifies the concept of competitive examinations. After the Civil Service Reform Act of 1978 was enacted, the Office of Personnel Management was responsible for assessing candidates, using centralized competitive examinations (written tests), for entry into the competitive civil service. As authority for human resources management was increasingly modernized and decentralized, the Office began to develop alternatives to the centralized examination process. Agencies became responsible for assessing candidates for competitive service positions. Agencies now use a variety of assessment instruments to evaluate job-related competencies, including written examinations; structured interviews; assessment centers; and evaluations of relative knowledge, skills and abilities, as well as competencies. Therefore, the references in title 5, United States Code, to examinations and competitive examinations include more than just written tests.

Amended subsection (a) of 5 U.S.C. 3303, as redesignated, retains the current authority for the President to prescribe rules for open, competitive examinations for applicants for appointment in the competitive service. However, section 3303(a) omits the provision in current law that allows the President to prescribe rules for noncompetitive examinations when competent applicants do not compete after notice of the vacancy has been given. This Presidential authority was delegated to the Office through Civil Service Rule 3.2 (Appointments without competitive examination in rare cases), and it was to be used only under rare and unusual circumstances. This provision is obsolete and confusing. The authority was used at a time when the Office was responsible for examining applicants for civil service positions (i.e., through centralized competitive examinations), and an exception was needed to expedite the process if qualifications of an individual were so rare that it did not make sense to use the standard competitive examination process. Agencies were required to justify the need for such a noncompetitive examination, and the appointments were published in Office annual reports. These days, most of the examining of applicants is done based on individual jobs, on a case-by-case basis.

Subsection (a) of redesignated section 3303, like the current section 3304(a)(1), also requires that competitive examinations must evaluate the relative capacity and fitness of applicants for Federal employment. This subsection expands the concept of competitive examination to include assessments other than a written test.

Subsection (b) of redesignated section 3303 includes the authority currently in 5 U.S.C. 3304(a)(3) for "direct hire" appointments when public notice has been given and the Director of the Office has determined that there is either a severe shortage of candidates or a critical hiring need.

Amended subsection (c) of section 3303 clarifies that individuals' appointments must be to the type of position they applied for and for which they were examined and public notice was given. This provision prevents an agency from advertising a position, assessing the candidates, and then appointing a selectee to a different position.

Subsection (d), as amended, of redesignated section 3303 codifies an applicant's right to appeal to the hiring agency his or her rating resulting from a competitive examination.

Subsection (e) of redesignated section 3303 authorizes the Director of the Office to establish, by regulation, the terms and conditions for considering applicants for competitive service positions. Currently, if an agency advertises a competitive service position and accepts applications from all candidates interested in the position, then the agency must consider all the individuals simultaneously who applied for the position. In this age of technology, this can be a daunting task because literally thousands of applications may be submitted on-line for a very small number of positions.

The Director's regulations under subsection (e) also would address how an applicant from outside the competitive service (such as the legislative or judicial branch, the excepted service, or a private or nonprofit organization) would be considered in filling a competitive

service position. The Director's regulations also would have to allow for consideration of applications submitted after the filing deadline because of the applicant's military service or hospitalization. Finally, the regulations would bar any preference based on service in the legislative or judicial branch.

Subsection (f) of redesignated section 3303 would remain essentially unchanged from the current section 3304(f), except that the reference to "career-conditional" appointments is removed and a technical, conforming change is made.

Paragraph (7) of section 302 of the bill would insert a new 5 U.S.C. 3303a after section 3303. The new section 3303a grants the Director of the Office of Personnel Management the authority to establish, and subsequently revoke if necessary, appointing authorities for the competitive and excepted services to meet ever-changing agency human resources needs. Currently, this authority is reserved for the President and the Congress. The Director could establish a new appointing authority only after publishing a notice in the *Federal Register* with an opportunity for public comment.

Paragraph (8) of section 302 would repeal section 3305 of title 5, which requires the Office to hold examinations at certain times. Subsection (b) of current section 3305 would be retained as subsection (c) of new section 3306 of title 5, as inserted by section 302(12) of the draft bill.

Paragraph (9) of section 302 of the bill would redesignate sections 3304a, 3307, and 3308 of title 5 as sections 3303b, 3304, and 3305, respectively.

Paragraph (10) of section 302, in subsection (A), would amend section 3304, as redesignated by paragraph (9), by renaming it "Maximum entry age requirements" and by simplifying and clarifying the first two subsections. Subparagraph (B) of paragraph (10) would amend subsections (d) and (e) of 5 U.S.C. 3304, as redesignated, to remove an obsolete reference to the minimum age for entry into a position as a law enforcement officer or firefighter. Subparagraph (C) would make a technical, editorial change in subsection (f) of section 3304. The amended section would allow agency heads to set maximum entry ages for law enforcement officer, firefighter, and air traffic controller positions.

Paragraph (11) of section 302 of the bill would amend 5 U.S.C 3305, as redesignated by paragraph (9), by adding a reference to "qualification standards" in the catchline (section title). The current text of section 3308 would become subsection (b) of redesignated section 3305, with minor editorial and conforming changes. Paragraph (11) of section 302 of the bill would insert a new subsection (a) in section 3305 as redesignated. The new subsection (a) gives the Director of the Office explicit authority to prescribe qualification standards. Currently, this authority is based on the Office's classification authority in chapter 51, and separating the Director's authority to establish classification and qualification standards is consistent with modernization of title 5.

Paragraph (12) of section 302 of the bill would insert after the redesignated section 3305 new sections 3306 and 3307.

The new section 3306 of title 5 consolidates provisions relating to veterans' preference, omits references to civil service registers, and clarifies how candidates who have received numerical ratings are ranked. The new section 3306 combines current sections 3305(b), 3309-3311, 3312(b), and 3313. However, new section 3306 does not include the provisions formerly found in sections 3314-3316. Current sections 3314 and 3315 are antiquated provsions that are inappropriate in a contemporary statute dealing with the Federal hiring system. Specifically, these provisions allowed preference eligibles who were separated or furloughed, as well as those who resigned, to have their names placed back on registers for positions for which they may have been qualified. This entitlement was based on the fact that, in the past, the Office maintained standing registers and all positions were filled from among individuals on those registers. The standard practice now is to announce individual vacancies. Most examining consists of an assessment or evaluation of an applicant's education and experience. Announcements of open competitive examinations are now widely disseminated through electronic means and are available nationwide. Therefore, because the Office no longer maintains standing registers for all occupations, a requirement to place an individual back on a register no longer has any practical meaning and is impossible to implement. In addition, we have removed current section 3316 authorizing the appointment of a preference eligible who has resigned or who has been dismissed or furloughed. This separate authority is no longer needed because the Office, through its authority under title 5 to prescribe regulations governing employment in the competitive service, has promulgated regulations relating to the reinstatement of both preference eligibles and non-preference eligibles.

The new section 3307 of title 5 essentially combines current sections 3312(a), 3351, and 3363, concerning waiver of certain physical requirements for preference eligibles upon appointment, transfer, or promotion.

Paragraph (13) of section 302 of the bill would strike sections 3309 through 3317 and section 3329 of title 5.

Paragraph (14) of section 302 would redesignate sections 3318 and 3319 of title 5 as sections 3308 and 3309, respectively.

Paragraph (15) of section 302 would amend section 5 U.S.C. 3308, as redesignated, by removing references to centralized civil service registers. Since agencies are no longer required to use central registers established by the Office of Personnel Management, references to central registers and certificates are obsolete. The redesignated section 3308 also includes language to accommodate pay systems other than the General Schedule, as well as veterans' preference provisions that are currently in section 3317.

Paragraph (16) of section 302 would amend section 3309 of title 5, as redesignated by paragraph (14) (relating to category rating), to make necessary conforming changes and to

include language regarding veterans' preference that is also being moved by paragraph (15) from the current section 3317(b) to the new section 3308.

Paragraph (17) of section 302 would redesignate section 3321 of title 5 as section 3310.

Paragraph (18) of section 302 would amend 5 U.S.C. 3310, as redesignated, by making technical and conforming changes and authorizing the Director of the Office to issue rules, regulations, and directives providing for probationary periods. Redesignated section 3310 would include a new subsection (d) which provides a definition of "probationary period."

Paragraph (19) of section 302 would insert new sections 3311 and 3312 of title 5, U.S. Code, after section 3310 as redesignated.

New section 3311 of title 5 (relating to noncompetitive appointments), in subsection (a), states that scientific and professional positions established under 5 U.S.C. 3104 are in the competitive service but that agencies may appoint individuals to such positions noncompetitively when the Director of the Office approves the individuals' qualifications. Such a decision by the Director would be based on standards developed by the agency. These agency standards, in turn, would have to be consistent with criteria which the Director of the Office would establish in regulations. Section 3311 also consolidates provisions that are currently in sections 3304(c), 3112, 3325, and 3329 of that title, relating to appointments of 30 percent or more disabled veterans, military technicians, and appointments to scientific and professional positions.

New section 3312 of title 5 combines provisions that are currently in sections 3327 and 3330 of that title, regarding the reporting of information on vacancies in the competitive service and the Senior Executive Service. New section 3312 differs from those current sections, however, by adding a requirement for agencies to notify the Office and U.S. Employment Service offices of opportunities to participate in competitive examinations and the conditions under which applicants may be considered, and by adding a requirement for that list to include information about who may apply. Section 3312 includes an authority for the Office to report the required information to the U.S. Employment Service on agencies' behalf.

Paragraph (20) of section 302 of the draft bill would redesignate section 3320 of title 5 as section 3313.

Paragraph (21) of section 302 would amend redesignated section 3313 of title 5 (regarding employment in the excepted service), to make certain conforming amendments and also would remove a reference to the District of Columbia government. New section 3313 would require employees in the excepted service to serve probationary periods consistent with those established for employees in the competitive service under 5 U.S.C. 3310, as redesignated by paragraph (17) of section 302 of the bill. Language in redesignated section 3313 requiring appointments in the excepted service to be made in the same manner and under the same conditions as appointments in the competitive service is

currently in 5 U.S.C. 3320. This requirement is being retained to reflect the Government's sustained commitment to veterans' preference.

Paragraph (22) of section 302 would insert after section 3313 the following heading to create a new subchapter II in chapter 33: "Subchapter II – Miscellaneous Provisions."

Paragraph (23) of section 302 would redesignate sections 3324 and 3328 of title 5 as sections 3321 and 3322, respectively.

Paragraph (24) would amend section 3321 of title 5, as redesignated, by replacing references to positions classified above GS-15 with references to senior-level positions established under 5 U.S.C. 3104. Like the provisions of section 3311 regarding appointments of individuals to positions as scientific and professional employees, redesignated section 3321 would make appointments to senior-level positions contingent upon approval of the qualifications of the appointees by the Director of the Office. The decision of the Director in this regard would be based on qualification standards established by the agency, which would have to conform to criteria prescribed by the Director in regulations.

Paragraph (25) of section 302 would retain the current section 3323, concerning mandatory retirement, with only minor wording changes, principally in the section title and to remove references to the government of the District of Columbia.

Paragraph (26) would redesignate section 3326 of title 5 as section 3324.

Paragraph (27) would strike sections 3325, 3327, and 3330 of title 5.

Paragraph (28) would redesignate sections 3330a through 3330c of title 5 as sections 3325 through 3327, respectively.

Paragraphs (29) and (30) of section 302 would amend redesignated sections 3326 and 3327, respectively, to make conforming changes made necessary by the renumbering of other sections.

Paragraph (31) of section 302 would insert after redesignated section 3327 a new section 3328, authorizing the Director of the Office to prescribe regulations to carry out the purposes of new subchapter II of chapter 33.

Paragraph (32) of section 302 would amend 5 U.S.C. 3341, concerning details, to remove the 120-day limit on details and to permit inter-agency details.

Paragraph (33) of section 302 would add at the end of subchapter IV of chapter 33, as redesignated by paragraph (1) of section 302, a new section 3349e authorizing the Director of the Office to prescribe regulations to carry out the purposes of the subchapter.

Paragraph (34) of section 302 would repeal sections 3351, 3362, and 3363 of title 5, some of the provisions of which would be incorporated in the new 5 U.S.C. 3307 by paragraph (12) of section 302.

Section 3362 of title 5, which requires agencies to give due weight to an incentive award under chapter 45 of title 5, in making promotion decisions, would become obsolete under the draft bill. The draft bill would establish a new authority for lump-sum performance payments under chapter 52. Moreover, the chapter 45 authority has been used to grant awards for many things that are not necessarily representative of performance or merit, including travel savings incentives, referral bonuses, heroic act awards, etc. Also, the definition of "award" under the implementing regulations for chapter 45 covers informal recognition items (mugs, parking privileges, etc.). Therefore, mandating consideration of chapter 45 awards in connection with promotion decisions no longer makes sense. Of course, even without section 3362, agencies would continue to be able to take awards into consideration in making decisions about promotions.

Paragraph (35) of section 302 would amend 5 U.S.C. 3361 to make two technical and conforming changes.

Paragraph (36) of section 302 would make a technical, conforming amendment to 5 U.S.C. 3395(e)(2)(A).

Paragraph (37) of section 302 would amend the table of sections for chapter 33 of title 5 to reflect the amendments made by the preceding paragraphs.

Section 303(1) of the bill would make a technical conforming amendment to 5 U.S.C. 2302(e)(1)(A), to ensure that all the appropriate sections of title 5 continue to be designated as "veterans' preference requirements" for purposes of the prohibited personnel practices.

Paragraphs (2) and (3) of section 303 of the draft bill would make technical, conforming amendments to four provisions of chapter 35 of title 5, U.S. Code.

Section 303(4) would move the provisions of current section 4802, which extends special appointment and compensation authorities to the Securities and Exchange Commission (SEC), to subpart I of part III of title 5, United States Code, and establish the same authorities under a new chapter 96. This amendment merely places the SEC provisions together with human resources management flexibilities for the Internal Revenue Service, the Department of Homeland Security, the National Aeronautics and Space Administration, and the Department of Defense.

TITLE IV. LABOR-MANAGEMENT RELATIONS; ADVERSE ACTIONS; APPEALS

Title IV of the bill would amend chapters 71, 75, and 77 of title 5, United States Code, concerning labor-management relations, adverse actions, and appeals.

Chapter 71 of title 5 – Labor Management Relations

Section 401 of the bill would amend chapter 71 of title 5, U.S. Code, to modify the current labor relations system.

Paragraph (1) of section 401 would amend section 7103(a) of title 5, which provides definitions for terms used in chapter 71. Subparagraph (A) of section 401(1) would amend the definition of "grievance" by providing that any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation will constitute a grievance if it was issued for the purpose of affecting conditions of employment. This includes any claimed violation, misinterpretation, or misapplication regarding an employee's pay, except those that involve the exercise of a manager's discretion. The rest of the definition remains unchanged.

Subparagraph (B) of section 401(1) would add a new definition of "emergency" to clarify the kinds of events, or potential events, that would constitute an emergency under the labor relations statute. These include circumstances resulting, or potentially resulting, in adverse impact on agency resources, increased workload due to unforeseen events, as well as changed mission requirements or budgetary exigencies imposed by authorities external to the affected agency.

Section 401(2) of the bill would amend section 7105 of title 5, regarding powers and duties of the Federal Labor Relations Authority. Subparagraph (A) would add new paragraphs (3) and (4) to subsection (a).

The new paragraph (3) of section 7105(a) compels the Chairman of the Authority to establish procedures, by regulation, for the fair, impartial, and expeditious assignment and disposition of cases. The Chairman must use a single, integrated process to resolve all matters associated with bargaining disputes. Paragraph (3)(A) requires these procedures to be used in all cases involving certain combinations of unfair labor practices, negotiability disputes, and bargaining impasses. These procedures may permit the use of a combination of mediation, fact finding, and any other appropriate dispute resolution method to resolve all disputes. Paragraph (3)(B) would allow these procedures to include an authority for the Chairman to direct the General Counsel of the Authority, the Federal Service Impasses Panel, or both, to submit a case pending before them to the Authority for appropriate action. This provision, by making it possible for the Authority to assess the best course of action to resolve all disputes in a streamlined, "one-stop" fashion, is consistent with the requirement in paragraph (3)(A) for a single, integrated process for resolving all matters associated with a bargaining dispute.

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The new paragraph (4) of 5 U.S.C. 7106(a) permits the Chairman to call a meeting of the members of the Authority without regard to the requirements of 5 U.S.C. 552b, regarding open meetings.

Section 401(2)(B) of the bill would amend subsection (d) of 5 U.S.C. 7105 to require the Chairman of the Authority to appoint specified directors, and administrative judges, and

others needed to carry out the Authority's functions. Amended subsection (d) also would permit the Chairman to delegate to officers and employees appointed under the subsection the authority to carry out the functions of the Authority.

Subparagraphs (C) and (D) of section 401(2) would amend subsections (e) and (f) of section 7105 of title 5 by replacing certain references to the Authority with references to the Chairman.

Section 401(2)(E) of the bill would amend subsection (g)(3) of 5 U.S.C. 7105 by striking "may" and inserting new language at the end which limits the Authority's ability to impose a *status quo ante* remedy. Such a remedy may not be imposed where there has been a finding that the agency has committed an unfair labor practice under section 7116(a)(5) or (6) (relating to refusal to consult or negotiate in good faith or failure or refusal to cooperate in impasse procedures) and the remedy would adversely impact the agency's or activity's mission or budget, or the public interest.

Section 401(3) of the bill would amend section 7106 of title 5, which deals with management rights. The amendment would add to subsection (a)(2)(D), concerning management's right to take necessary actions to carry out the agency's mission in an emergency, an explicit authority to prepare for, practice for, or prevent any emergency.

Section 401(4) of the bill would amend section 7114(a)(2) of title 5. Subparagraph (A)(i) would amend subsection (a)(2) of section 7114 to clarify (in subparagraph (C)) the union's right to be represented at formal discussions by providing that unions do not have a right to attend a meeting where a conversation between management and bargaining unit employees constitutes a reiteration or application of one or more existing personnel policies, practices, or working conditions; is incidental or otherwise peripheral to the announced purpose of the meetings; or does not result in an announcement of a change to, or a promise to change, one or more existing personnel policies, practices, or working conditions.

The new subparagraph (A) of 5 U.S.C. 7114(a)(2) clarifies that the right of a union to be represented at grievances applies only to those grievances filed under the negotiated grievance procedure. The new subparagraph (B) essentially restates the existing subparagraph (B) regarding the union's right to be present during an investigatory examination.

Subparagraph (B) of section 401(4) would amend subsection (b)(4) of 5 U.S.C. 7114 to shorten and clarify requirements relating to the release of information. The amended paragraph (4) requires release to an exclusive representative of information when it is normally maintained, reasonably available, and requested by the exclusive representative; a particularized need has been demonstrated; and the disclosure is not prohibited by law.

Subparagraph (C) of section 401(4) would redesignate subsection (c) of 5 U.S.C. 7114 as subsection (d) and insert a new subsection (c) to prescribe the circumstances in which disclosure would not be required. In addition to incorporating the exclusions contained in

the existing paragraph (4)(C), new subsection (c) also bars disclosure of information when prohibited by law, regulation, or agency directives and issuances or when an adequate alternate means for obtaining the information exists. Information subject to disclosure also does not include personal employee information such as phone numbers or addresses, or disclosures that compromise national security, agency mission, or employee safety.

Section 401(5) of the bill would amend 5 U.S.C. 7117, regarding the duty to bargain and consult, by redesignating subsections (a)-(d) as subsections (b)-(e) and inserting a new subsection (a). The new subsection states that an agency and a labor organization are obligated to bargain or consult over a subject that is otherwise negotiable only if the change will affect the bargaining unit (or a portion of the bargaining unit) in a way that is foreseeable, substantial, and significant in terms of both its impact and duration.

Section 401(6) of the bill would make technical and conforming amendments to section 7120 of title 5. The amendments would strike "Assistant Secretary of Labor for Labor Management Relations" and "Assistant Secretary" wherever those terms appear and insert "Secretary of Labor."

Section 401(7) of the bill would amend section 7121 of title 5, regarding grievance procedures. Subparagraph (A) of section 401(7) would make a technical change in 5 U.S.C. 7121(a)(1) to clarify that the negotiated grievance procedure is the exclusive procedure for resolving grievances under chapter 71 of title 5.

Subparagraph (B) of section 401(7) would exclude from these procedures any subject not within the definition of "grievance" in section 7103 (including the classification of any position, while clarifying that adverse actions generally continue to be grievable.

Subparagraph (C) of section 401(7) would amend subsection (e) of section 7121 to provide that an aggrieved employee may raise matters appealable to the Merit Systems Protection Board under an applicable appellate procedure or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under section 7121 when the employee timely files an appeal under the applicable appellate procedures, or a grievance in accordance with the parties' negotiated grievance procedure, whichever occurs first. In a case where an arbitrator hears an appealable matter, he or she is bound by the same standards as a Board administrative judge.

For purposes of review and appeal, subsection (e)(3) of 5 U.S.C. 7121 provides that an arbitration award under this subsection is considered equivalent to a decision by a Merit Systems Protection Board administrative judge and is subject to full Board review.

Subparagraph (D) of section 401(7) of the bill would strike subsection (f) of 5 U.S.C. 7121 and would redesignate subsection (g) as subsection (f). In subsection (f), as redesignated, subparagraph (E) of section 401(7) of the bill would amend paragraph (4) to clarify that an aggrieved employee who is permitted to elect only one of the remedies listed in paragraph (3) is considered to have elected whichever option he or she elected first.

Subparagraph (F) of section 401(7) would insert a new subsection (g) of 5 U.S.C. 7121 to provide that an arbitrator hearing a matter under chapter 71 is bound by all applicable laws, rules, regulations, and agency directives, including applicable provisions of chapter 71.

Subparagraph (G) of section 401(7) would add a new subsection (i) to 5 U.S.C. 7121 to provide in paragraph (1) of the subsection that an employee may grieve a performance rating of record that has not been raised in connection with an appeal of an adverse action under chapter 77 and that, once an employee raises an issue involving a rating of record in an appeal under chapter 77, any pending grievance or arbitration concerning that rating of record will be dismissed with prejudice.

Paragraph (2) of the new 5 U.S.C. 7121(i) specifies that an arbitrator may cancel a rating of record when he or she finds that the agency applied the employee's established performance requirements or expectations in violation of applicable law, agency rule or regulation, or provision of a collective bargaining agreement in a manner prejudicial to the grievant. In such circumstances, the arbitrator may order the agency to change the grievant's rating only when the arbitrator is able to determine the rating the agency would have given but for the violation. When an arbitrator is unable to determine what the employee's rating would have been if the violation had not occurred, the arbitrator must remand the case to the agency for re-evaluation. An arbitrator may not independently evaluate the employee's performance or otherwise substitute his or her judgment for the supervisor's judgment.

Section 401(8) of the bill would amend the first sentence of subsection (a) of 5 U.S.C. 7122 to provide that either party to arbitration under chapter 71 may file with the Authority an exception to any arbitration award--except an award issued in connection with a matter appealable to the Merit Systems Protection Board, or a similar matter arising under other personnel systems--which is considered equivalent to a decision of a Board administrative judge and is subject to full Board review.

Chapter 75 of title 5 – Adverse Actions

Section 402 of the bill would amend chapter 75 of title 5, United States Code, concerning adverse actions.

Paragraph (1) of section 402 would amend section 7501 of title 5 to modify the definition of an employee who is entitled to procedural due process when suspended for 14 days or less. The amendment provides that an individual who is not a preference eligible and who has completed a probationary period under an initial appointment in the competitive service is an "employee" for purposes of subchapter I. A preference eligible in the competitive service who has completed one year of creditable service (even if still serving a probationary period) is also covered by the provisions of subchapter I.

Paragraph (1) of section 402 would add a new subsection (b) to 5 U.S.C. 7501 to make clear that subchapter I of chapter 75 does not apply to (a) employees who are serving under time-limited appointments of unspecified duration (unless they are preference eligibles in

the competitive service who have completed one year of creditable service), or to (b) employees serving under time-limited appointments of one year or less. These changes reflect additional amendments made by Title III of the bill.

Paragraph (1) of section 402 also would amend the definition of "suspension" in 5 U.S.C. 7501 to reflect the fact that adverse actions may be taken under chapter 75 based on performance as well as conduct.

Paragraph (2) of section 402 would change the heading for subchapter II to remove a reference to reduction in grade and add a reference to demotion.

Paragraph (3) of section 402 would amend section 7511(a) of title 5, which defines terms used in subchapter II of chapter 75 of title 5, relating to procedural due process for employees who are removed, suspended for more than 14 days, reduced in pay, demoted, or furloughed for 30 days or less.

Subparagraph (A) of section 402(3) would amend the definition of "employee" for purposes of the subchapter. The amendment parallels the change in the definition of "employee" under subchapter I of chapter 75; it would provide that employees covered by the subchapter are those in either the competitive or excepted service (a) who are not preference eligibles and who have completed a probationary period under an initial appointment and (b) who are preference eligibles and have completed one year of creditable service.

Subparagraph (A) of section 402(3) also would add two new definitions, "demotion" and "probationary period." A demotion would be defined to include a reduction in grade, a reduction to a lower band within the same career/occupational subgroup (or group if there are no subgroups), or a reduction to a lower band in a different career/occupational group or to a different subgroup in the same career/occupational group. "Probationary period" is defined by reference to sections 3310 and 3313.

Subparagraph (B) of section 402(3) would amend 5 U.S.C. 7511(b) to add two new exclusions: those who are serving under time-limited appointments of unspecified duration (except preference eligibles who have completed one year of creditable service) and those who are serving under time-limited appointments of one year or less. These changes parallel those made in section 7501 of title 5 by section 402(1) of the draft bill.

Subparagraph (B) of section 402(3) also would replace a reference to the General Accounting Office in 5 U.S.C. 7511(b) with a reference to the Government Accountability Office.

Paragraph (4) of section 402 of the bill would amend section 7512 of title 5, U.S. Code, which defines the actions covered by subchapter II of chapter 75.

Subparagraph (A) of section 402(4) would amend section 7512(3) of title 5 to replace "reduction in grade" with "demotion," consistent with the change in the subchapter title.

Subparagraph (B) of section 402(4) would amend section 7512(C) to make necessary conforming changes.

Subparagraphs (C) and (D) of section 402(4) would strike 5 U.S.C. 7512(D) and redesignate subparagraph (E) of section 7512 as subparagraph (D). The current subparagraph (D) deals with actions taken under the current 5 U.S.C. 4303. Section 4303, which currently provides a separate authority to remove or demote an employee based on unacceptable performance, is not included in the revision of chapter 43 that would be enacted by Title II of this bill. Therefore, the reference to actions taken under section 4303 would become obsolete.

Subparagraph (E) of section 402(4) would make a technical editorial change, and subparagraph (F) would add four new actions that would be excluded from coverage under subchapter II of chapter 75: actions during a probationary period, except when taken against a preference eligible who has completed the first year of the probationary period; termination of time-limited promotions and temporary within-band increases in pay when the employee is returned to a grade or band and pay rate no lower than that held before the temporary promotion or temporary within-band increase; actions taken against employees serving a time-limited appointment of unspecified duration (other than preference eligibles with one or more years of creditable service); and termination of employees serving a time-limited appointment when the termination is effective on the same date the appointment expires.

Paragraph (5) of section 402 of the bill would amend section 7531(a) of title 5 to update the definition of "agency" by removing the Coast Guard, by adding the Department of Homeland Security, and by replacing the reference to the Atomic Energy Commission with a reference to the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission.

Paragraph (6) of section 402 of the bill would make similar changes in section 7533 of title 5 regarding references to the Atomic Energy Commission.

Chapter 77 of title 5 – Appeals

Section 403 of the bill would amend chapter 77 of title 5, United States Code, concerning appeals.

Paragraph (1) of section 403 would amend section 7701, relating to appellate procedures. Subparagraph (A) of section 403(1) would amend section 7701(a)(1) to allow for the scope of a hearing to be limited, or for no hearing to be held, if it is determined that some or all of the facts are not in genuine dispute. Subparagraph (B) of section 403(1) would amend section 7701(c)(1) to delete a provision that sets forth the standard for review for actions taken based on unacceptable performance under section 4303 of title 5. This amendment is needed to conform to the revision of chapter 43 that would be enacted by Title II of this

bill. A single standard of proof (preponderance of the evidence) will apply to all actions covered by subchapter II of chapter 75.

Paragraph (1)(B) of section 403 also would amend section 7701(c) to provide that an agency's determination regarding the penalty imposed in any ation taken under chapter 75 may not be modified unless it is totally unwarranted in light of all pertinent circumstances. In evaluating the appropriateness of a penalty, the Board is compelled to give primary consideration to the impact on the mission of the agency or activity, as determined by the agency.

Paragraph (2) of section 403 would amend 5 U.S.C. 7703(d) to remove the discretion of the Court of Appeals to grant or deny a petition for judicial review.

Section 404 of the bill would amend chapter 12 of title 5, concerning the Merit Systems Protection Board. Paragraph (1) would amend 5 U.S.C. 1204(g) to provide that the Chairman of the Board may delegate any of the Board's administrative functions under title 5 to any employee of the Board. Paragraph (2) would redesignate subsections (j) through (m) of 5 U.S.C. 1204(g) as subsections (k) through (n), respectively, to make room for a new subsection (j). Paragraph (3) would insert a new subsection (j), authorizing the Chairman to call a meeting of the Board members without regard to section 552b of title 5, regarding open meetings. Paragraph (4) would add an authority for the Chairman to delegate to officers and employees appointed under subsection (k) of section 1204, as redesignated, the authority to perform any duties or make any expenditures that may be necessary.

TITLE V. MISCELLANEOUS PROVISIONS

Title V of the bill includes an uncodified savings provision, technical and conforming amendments, and effective date provisions.

Savings Provision

Section 501 would provide that the amendments made by sections 402 and 403 of the bill to chapters 75 and 77 of title 5, United States Code, relating to adverse actions and appeals do not apply to adverse actions proposed prior to the effective date of those amendments.

Technical and Conforming Amendments

Section 502 of the bill would provide technical and conforming changes and would address other references that would need to be changed or interpreted upon enactment of the bill.

Subsection (a), on the date of enactment of the Act, would repeal a number of provisions of law. Paragraph (1) would repeal portions of title 5, United States Code, including section 5306, relating to pay fixed by administrative action, and subchapter IX of chapter 53, relating to special occupational pay systems. Paragraph (2) would repeal sections 209, 404, and 406 of the Federal Employees Pay Comparability Act of 1990. Section 209 of

that Act authorizes staffing differentials for employees in grade GS-5 or GS-7 or a 2-grade interval occupational series. Section 404 of that Act requires special pay adjustments for law enforcement officers in selected cities (geographic adjustments). Section 406 requires the Office of Personnel Management, notwithstanding section 601(a)(2) of Public Law 100-453, relating to a demonstration project on mobility and retention for the New York Field Division of the Federal Bureau of Investigation, to reduce the rate of periodic payments to employees under that section as the provisions of the Federal Law Enforcement Pay Reform Act of 1990 are implemented, as long as no such reduction results in a reduction of total pay for any employee of the New York Field Division. It also allows the Office to make the periodic payments inapplicable to employees newly appointed or transferred to the New York Field Division on or after January 1, 1992.

Subsection (b) of section 502 of the bill, effective on the first day of the first pay period beginning on or after January 1, 2010, would repeal a number of provisions of law. Paragraph (1) would repeal a number of provisions of title 5, United States Code, including chapter 51, governing classification; section 4505a, relating to performance-based cash awards; sections 5304 and 5304a, relating to locality-based comparability payments and the authority to fix an alternative level of such payments, respectively; section 5305, relating to special salary rates; section 5755, authorizing supervisory differentials; and subchapters III, IV, and VI of chapter 53, relating to General Schedule pay rates, prevailing rate systems, and grade and pay retention, respectively.

Paragraph (2) of section 502(b) would repeal section 4 of Public Law 103-89, relating to the treatment of employees covered by the performance management and recognition system. That system was terminated nearly 12 years ago, and these special rules will no longer be necessary.

Paragraph (3) of section 502(b) would repeal sections 403 and 405 of the Federal Employees Pay Comparability Act of 1990, relating to special rates for law enforcement officers and extending those benefits and the geographic adjustments to other law enforcement officers.

Subsection (c) of section 502 would require specific interpretations of certain references in provisions of law. Paragraph (1) would provide for the appropriate interpretation of references to the maximum rate of basic pay under 5 U.S.C. 5376 for certain senior-level and scientific and professional positions

Paragraph (2) of section 502(c) would require that, effective on the first day of the first pay period beginning on or after January 1, 2010, a reference to the maximum rate of basic pay for the General Schedule or for grade GS-15 of the General Schedule be considered to be a reference to the rate that is 90 percent of the rate for level V of the Executive Schedule or, if any locality or geographic adjustment is added to basic pay, the rate for level IV of the Executive Schedule.

Effective Date; Transition; Application

Section 503 of the bill would provide the effective date for the amendments made by the bill. It also would provide for exceptions to the application of specified new provisions of law and for an orderly transition to the new classification and pay systems established under the bill.

Subsection (a) would require, with exceptions provided in the remaining provisions of the section, that the amendments made by Titles I through IV of the bill take effect 180 days after enactment.

Subsection (b) would provide that the amendments made by section 203(4) and (5) of the bill will take effect on the date of enactment. These are the amendments authorizing contributions to the Thrift Savings Fund based on lump-sum bonus payments.

Subsection (c) provides that the amendments made by section 203(1)(D)(iv)(I)(aa) and (1)(F) shall take effect on the first day of the first pay period beginning on or after January 1, 2010. These amendments would set the minimum rate of basic pay for members of the Senior Executive Service and employees in senior-level and scientific and professional positions at 85 percent of the rate for level V of the Executive Schedule.

Subsection (d) would allow the Director of the Office to prescribe regulations providing for an orderly transition regarding the movement of employees from the General Schedule pay and classification system to the new systems established under the new chapter 52 of title 5. This authority includes the authority to modify provisions of chapters 51 and 53 as the Director determines necessary. For example, the Director may need to modify provisions of section 5304, dealing with establishment and adjustment of locality-based comparability payments.

Subsection (d), in paragraph (2), also would allow the Director to authorize market-based pay systems under chapter 52 in advance of the development of performance-based pay. The Director could design a core compensation system that maintains the 15-grade, 10-step structure of the General Schedule but places employees in career/occupational groups with market-based rate ranges and supplements. Thus, the Director could move toward a strategic compensation system in two phases: first, market-based pay and then performance-based pay.

Finally, paragraph (3) of subsection (d) would make clear that, until coverage under chapter 52 of title 5 is extended to all eligible employees, the Director may continue to make pay adjustments under chapter 53 of title 5.

Subsection (e) would provide additional exceptions to the effective date specified in subsection (a).

Paragraph (1) of section 503(e) would require the head of each covered agency to apply new chapter 52 to all eligible employees no later than the first day of the first pay period beginning on or after January 1, 2010. Paragraph (1) allows the Director to change this date if there is an emergency declared by the President.

Paragraph (2) of section 503(e) would require each agency with eligible employees who are not covered by new chapter 52 as of January 31, 2008, to submit to the Office no later than March 31, 2008, a plan for applying that chapter to all of those employees before the deadline established in paragraph (1).

Paragraph (3) of section 503(e) would require a category of employees to continue to be covered by the Federal laws and regulations that would apply to them in the absence of new chapter 52 until an agency makes a determination under this subsection regarding the coverage of that category of employees.

Subsection (f) of section 503 would bar the rescission of the coverage of a category of employees once that category of employees has been covered by new chapter 52 of title 5 in accordance with subsection (e).